FILED
AUG 16 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term 1951

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary Unincorporated Association and Labor Union, et al.,
Petitioners,
vs.
WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, et al.,
Respondents.
No. 245

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary Unincorporated Association and Labor Union, et al.,
Petitioners,
vs.
WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, et al.,
Respondents.
No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

BOUSLOG & SYMONDS
By HARRIET BOUSLOG
63 Merchant Street
Honolulu 13, Hawaii
Attorneys for Petitioners.

SUBJECT INDEX

	Page
OPINIONS BELOW	2
SUMMARY STATEMENT OF MATTER INVOLVED	2
A. Parties, Issues and Jurisdiction	2
B. Proceedings in the District Court	5
1. Proceedings Prior to Hearing on the Merits	5
2. Evidence and Findings of Fact and Conclusions of Law of the District Court	6
a. Evidence and Findings of Fact Relevant to Both Cases	6
b. The Paia Incident – 12,301	8
c. The Lanai Incidents – 12,300	10
d. The Grand Jury Issue	12
e. Bad Faith of Prosecutions	13
f. Irreparable Injury, Exceptional Circumstances and Unconstitutionality of Statute	15
g. Decrees and Judgments of the District Court	15
C. Decision of the United States Court of Appeals	16
STATEMENT AS TO JURISDICTION	17
STATUTES INVOLVED	17
QUESTIONS PRESENTED	18
REASONS RELIED ON FOR THE GRANTING OF THE WRIT	18

APPENDIX I, Unlawful Assembly and Riot Statute, Chapter 277, Revised Laws of Hawaii 1945, Sections 11570-11584	53
APPENDIX II, Conspiracy Statute, Chapter 243, Revised Laws of Hawaii 1945, Sections 11120-11130	58

TABLE OF AUTHORITIES CITED

Cases

	Page
American Federation of Labor v. Watson, 327 U. S. 582	16, 17, 19
Cooper v. Hutchinson, 184 F. (2d) 118	19
Douglas v. Jeannette, 319 U.S. 157, 163	16, 18, 19
Hague v. CIO, 307 U.S. 496	16, 19
Kentucky v. Powers, 201 U.S. 1	20
McShane v. Maldoven, 179 F. (2d) 425	19
Mo Hock Ke Lok Po v. Stainback, 336 U.S. 386, 74 F. Supp. 852	5
Screws v. United States, 325 U.S. 91	16, 19, 20
Stefanelli v. Minard, 341 U.S. 930, 184 F. (2d) 575	19
Territory v. Kaholokula, 37 Haw. 625	10
United States v. Classic, 313 U.S. 299	16

Statutes

Constitution of the United States:	
Fifth Amendment	13
Sixth Amendment	13
Civil Rights Act	3, 19, 20
8 U.S.C.A. 43, §1797	2, 17, 19
Judicial Code:	
28 U.S.C. 1254 (1)	17
28 U.S.C.A. 1337	3
28 U.S.C.A. 1343, 28 U.S.C. 41 (14)	2, 3
28 U.S.C.A. 1344 (3)	2
Hawaiian Organic Act Section 83	13
Revised Laws of Hawaii 1945:	
Conspiracy Statute, Chapter 243, Sections 11120-11130	2, 3, 4, 6, 7, 8, 15, 18, 20
Unlawful Assembly and Riot Statute, Chapter 277, Sections 11570-11584	2, 3, 4, 5, 6, 7, 8, 10, 12, 14, 15, 18, 20

IN THE

Supreme Court of the United States

October Term 1951

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary Unincorporated Association and Labor Union, et al.,
Petitioners,
vs.
WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, et al.,
Respondents.
No.....

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary Unincorporated Association and Labor Union, et al.,
Petitioners,
vs.
WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, et al.,
Respondents.
No.....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioners pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Ninth Circuit made February 28, 1951, petition for rehearing denied on May 25, 1951, which decision reversed a unanimous final decision in these two cases of the United

States District Court for the District of Hawaii sitting *en banc*, composed of Senior United States Circuit Judge John Biggs, Jr., of the Third Judicial Circuit, Senior United States District Judge Delbert E. Metzger, of the United States District Court for the District of Hawaii, and United States District Judge George B. Harris, of the Northern District of California, holding that petitioners' complaint for injunction and for redress of the deprivation of constitutional rights stated a case of both federal and equitable jurisdiction, and after full hearing on the merits, a) adjudging the unlawful assembly and riot act and the conspiracy act of the Territory of Hawaii void as unconstitutional, b) restraining the respondents and their representatives, agents, deputies and successors in office from proceeding with the prosecution of the individual petitioners under any complaint or indictment based on these acts, c) declaring the method of selection of the Grand Jury of Maui County in violation of constitutional requirements, and d) granting the benefits of the decrees to the petitioning union and its petitioning officers in their representative capacity.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported in 187 F. (2d) 860, and is set forth in the transcript of the record at pages 2006-2025.

The opinion of the United States District Court for the District of Hawaii, sitting *en banc*, is reported in 82 F. Supp. 65, and is set forth at pages 370-520 of the transcript of the record.

SUMMARY STATEMENT OF MATTER INVOLVED[1]

A. PARTIES, ISSUES AND JURISDICTION.

These two cases are civil rights cases brought to redress

[1] Unless otherwise indicated, the facts in the Summary Statement of Matter Involved appear in the Opinion, 82 F. Supp. 65, R. 366-520, R. 2-26, 31-34, R. 12,300, 2-34.

the deprivation under color of territorial law of constitutional and federal rights.[2] The petitioners are an unincorporated association and labor union, two officers and members of the union in their representative capacity on behalf of the 30,000 members of the union, and 127 individuals threatened with specific prosecutions under color of the unlawful assembly and riot act and the conspiracy act of the Territory of Hawaii.[3]

The individual petitioners and the members of the union are daily wage earners in the sugar and pineapple and other industries of Hawaii. The individual petitioners are ethnologically (or as a matter of mores of the Islands) members of races other than the Caucasian race.

The jurisdiction of the District Court was found to rest on Sections 1343 and 1337 of Title 28 of the Revised Judicial Code and the Civil Rights Act.

The respondents at both numbers are the Attorney General of the Territory, the Chief of Police of Maui County, and the former County Attorney of Maui County, and his Deputy, at the time the acts complained of occurred. They are sued both individually and in their representative capacity. The action as to other defendants named in the complaint was dismissed by the District Court.

The petitioners' complaints alleged that strikes were conducted by the union in the sugar and pineapple industries in 1946 and 1947; that in furtherance of the objectives of the strike, that is, the improvement of wages, hours and con-

---

[2] Section 1797 of the Civil Rights Act of March 1, 1875, 8 U.S.C.A. Section 43 and Section 41(14) of the Old Judicial Code, and 28 U.S.C.A. Section 1344(3).

[3] The 52 individual petitioners, other than Kawano, at No. 12,300, are threatened with prosecutions. Since the unlawful assembly act complained of is a felony punishable by 20 years imprisonment, prosecution can be only by indictment of the grand jury. An indictment under both the unlawful assembly act and the conspiracy act has been returned, under circumstances hereafter described, against the individual petitioners, other than Rania, in 12,301.

ditions of employment, the petitioners engaged in lawful peaceful and constitutionally protected activities of speech, press and assemblage, and of peaceful picketing.

The complaint, at Number 12,300, in the United States Court of Appeals, alleged that the respondent Chief of Police caused the individual petitioners to be arrested and charged by police complaint with purported violations of the territorial unlawful assembly and riot act; that the respondents Ackerman, Bevins and Crockett sought to present purported criminal charges, framed on the police complaints, to the grand jurors of Maui County; that the unlawful assembly and riot act, under which the respondents sought to present purported criminal charges, is unconstitutional in that it deprives the petitioners of their rights of free speech, press and assembly, and will subject them to criminal prosecution if they exercise their constitutional rights; that certain of the individual petitioners had filed motions and challenges to the grand jury and to the methods employed in selecting its members; that the grand jury had been selected and composed in a manner violating the constitutional rights of these petitioners, and that challenges and motions had been held to be without merit in a hearing in which these petitioners were denied due process of law.

The complaint at Number 12,301, in the United States Court of Appeals, differed in that it also attacked the conspiracy statute of the Territory; it alleged that the respondents had presented purported criminal charges of alleged violation of the unlawful assembly and riot act and the conspiracy act to the grand jurors against the individual petitioners; that the grand jury, to which such purported charges were presented, was selected and composed in a manner which violated the petitioners' rights.

The complaints at both numbers alleged that unless the unlawful assembly and riot statute and the conspiracy statute were held to be unconstitutional and void, the peti-

tioners would be deprived of their constitutional rights, and that it was necessary and imperative for the court to assume jurisdiction and restrain and enjoin the respondents in order that petitioners have an impartial, representative and democratic grand jury; that petitioners had no plain, adequate or speedy remedy at law, and that unless respondents were enjoined as prayed, petitioners would be deprived of rights secured to them by the Constitution and laws of the United States; that the union cannot function, exercise its property and personal rights in the County of Maui so long as its members are subject to indictment by illegally constituted grand juries, and subject to prosecution under these unconstitutional statutes, because of the fear and intimidation of its members engendered by the threat of punishment for the exercise of rights guaranteed by the Constitution.

Petitioners prayed that the court issue temporary and permanent injunctions prohibiting the enforcement of these statutes against the petitioners and enjoining the submission to the grand jury of purported charges based on the unlawful assembly and riot act; that the court declare the statutes to be unconstitutional and adjudge the methods used in selecting the grand juries of Maui County to be unconstitutional and contrary to law.

B. PROCEEDINGS IN THE DISTRICT COURT.

1. Proceedings Prior to Hearing on the Merits.

On the basis of the showing made of the unconstitutionality of the statutes, and irreparable injury to petitioners, a temporary restraining order was issued by Federal District Judge Metzger and confirmed, though modified in form, after the hearing on the return to the order to show cause and motion to dissolve it. (R. 27, 99-103.)

Pursuant to the prayer of the complaint, and in accordance with the state of the law as it existed under the decision in *Mo Hock Ke Lok Po v. Stainback,* 74 F. Supp. 852, and

prior to the decision of this Court in 336 U. S. 386, a three-judge court was convened to hear the case.

2. Evidence and Findings of Fact and Conclusions of Law of the District Court.

a. Evidence and Findings of Fact Relevant to Both Cases.

Upon the hearing on the merits, the petitioners showed a persistent and long continued policy of the respondent law enforcement officers of singling out members of the union, including the individual petitioners, for harsher treatment than other persons in the community for like offenses, and a persistent policy of treating picketing as conspiratorial in nature, invoking the unconstitutional twenty-year felony of unlawful assembly and riot and the conspiracy act against the members of the union for trivial incidents and minor law infractions occurring during the course of picketing activities.

The extraordinary and exceptional nature of the economic and sociological background of Hawaii's industrialized agriculture, in which the labor disputes involving petitioners arose, is described and found by the court from standard and accepted sources. (R. 380-390.)

The District Court found as fact:

That the union has spent in excess of one-third of a million dollars in Hawaii since 1944 in organizing 30,000 workers in the sugar, pineapple and other industries; that large sums of money are spent monthly in the administration and servicing of the locals; that the money is contributed by the members through monthly dues.

That the purpose of the union is to improve the wages, hours and working conditions of its members in these industries; that the union and its members have no way of achieving their objectives except by striking, if collective bargaining and voluntary mediation fails to settle disputes because the employers of the members of the petitioning union all

refuse to submit contract issues involving wages to arbitration.

That wages for common labor had been increased from $1.84 a day, fixed by the federal government in 1943, to which a 15% bonus was added, to in excess of eight dollars a day under existing union contracts.

That the fear generated by the mass arrests made by respondents under color of the unlawful assembly and riot statute against the individual petitioners in these cases for minor disturbances on picket lines has seriously weakened the ability of the union to strike.

That mass arrests during the pineapple strike, under color of these statutes, for picket line disturbances broke the strike and demoralized many of the workers, who left the union; that after the strike, membership on the island of Lanai, where the mass arrests occurred, dropped from 1300 to 800.

That the unlawful assembly and riot act substantially affected the course of labor-management relations in Hawaii as the union felt it would be suicide to strike for higher wages in the face of the consistent established use of the twenty-year felony of unlawful assembly and riot for minor disturbances on picket lines.

That during the sugar strike, 21 members of the union were charged with and indicted for unlawful assembly and conspiracy; that the charges were dropped two months after the Territory-wide strike was over and nolo contendere pleas accepted to misdemeanor assault and battery charges.

That during the pineapple strike, 83 members of the union were arrested; that the charges were dropped, after the strike, for lack of evidence. Petitioners introduced evidence to show that these arrests were made and the defendants in the case held for five hours purportedly for violations of the unlawful assembly and riot act, and that finally a

charge of obstructing the highway was made and dropped after the strike for lack of evidence.

That the mere existence of the statute has been used by Territorial courts to justify sweeping injunctions against peaceful picketing except as limited to three persons.

That excessive bail[4] was exacted in these cases; that mass arrests were made in many instances where no evidence of even presence at the scene of the alleged incident existed, other than pictures concededly taken at the scene both before and after the incidents occurred; that the reported cases indicated that the unlawful assembly and riot statute had been used only against labor while engaged in labor disputes, since Hawaii became a part of the United States.

The present suits grew out of three incidents which occurred during the 1946 sugar strike and 1947 pineapple strike. These incidents are referred to as the Paia Incident and the Lanai Incidents.

The 1946 sugar strike commenced on September 1, 1946 and lasted until November 19, 1946, except at Pioneer Mill Company, Lahaina, Maui, where it continued until January 2, 1947 because that company discharged for purported violations of its house rules ten of its employees upon their being charged with unlawful assembly, riot and conspiracy. (R. 1191, 1196-1197.)

The 1947 pineapple strike lasted from July 10 to July 15, 1947.

b. The Paia Incident—12,301.

The Record and the District Court's findings on the Paia incident show:[5]

Beginning September 1, 1946, 20,000 sugar workers in the Territory went on a strike which was authorized by a

[4] Bail in assault and battery and other misdemeanors ordinarily does not exceed $25.00 in Hawaii.

[5] The District Court's findings of fact on this incident are set forth at pages 391-401 of the Record. The District Court accepted respondents' version of the facts.

vote of 94 percent of the union's members. The 79-day strike was remarkable in its freedom from incidents involving infractions of the law (R. 399, note 25). At Paia, Maui, where the Maui Agricultural Company is located, 1,000 employees were on strike. Paia is a company town of 3,000, inhabited almost wholly by the employees of the company, including members of the union and their families.

For the first 45 days of the 79-day strike, large groups of pickets peacefully picketed the premises of the company. Police were present at most times and raised no objections. On the 46th day of the strike, October 16, 1946, there was a moving picket line estimated varyingly from 250 to 500 persons. Five employees desiring to return to work and 18 to 20 police officers were present. When these employees approached the line and it did not open up, Assistant Chief of Police Freitas called the pickets together into a group and read them the loitering statute which provides:

> Any person who shall loiter or loaf or idle upon any public highway, street or sidewalk, thereby impeding or rendering dangerous the passage of pedestrians or others lawfully using the public highway, street or sidewalk, or thereby in any way imperiling the public welfare or thereby tending in any way to cause a breach of the peace, is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $25 nor more than $250 or imprisonment for not less than thirty days nor more than 90 days.

The picket line was not opened and after this second attempt, the five men left. No order to disperse was made at any time by any of the police officers present.

The whole incident took no more than three minutes. Assistant Chief of Police Freitas testified that he congratulated the people on keeping their heads and that they applauded him. He testified that he thanked one of the petitioners, Joseph Kaholokula, for his assistance in getting the pickets to listen to him, and told him that he was glad nothing seri-

ous had occurred. He said he might make a test case of the loitering statute against four or five of the pickets.

No arrests were made at that time, and none were made until at least three days later when the same police officer swore out a complaint charging approximately fifty of the petitioners with unlawful assembly and riot.

Petitioners were arrested, questioned without being warned of their rights and required to put up bail ranging from $1,000 to $100. Subsequently seventy-nine persons, including four shown not to have been on the picket line that morning, were indicted for unlawful assembly and riot.

They were arraigned before the Second Circuit Court and demurred to the indictment. When the demurrer was over-ruled, an interlocutory appeal was taken to the Supreme Court of the Territory which held the indictment defective but upheld the constitutionality of the statute on November 26, 1947. *Territory v. Kaholokula,* 37 Haw. 625.

While the *Kaholokula* case was still pending before the Supreme Court of the Territory, and before the twenty-day period allowed for rehearing expired, and before the remittitur went from the Supreme Court of the Territory to the Second Circuit Court, and at a time when the respondents were restrained by order of the District Court from proceeding to indict the individual petitioners in 12,300 because of the alleged unconstitutionality of the unlawful assembly statute as well as the unconstitutionality of the method of selection and composition of the 1947 grand jury, the respondents, without notice to petitioners, presented and procured an indictment under the challenged statute from the challenged jury.

c. The Lanai Incidents—12,300.

The evidence[6] on the Lanai incidents shows that during

[6] The District Court's findings of fact on the Lanai incidents are set forth at pages 402-409. The District Court in these incidents also adopted as facts testimony of respondents' witnesses.

the 1947 pineapple strike, which lasted from July 10 to July 15, 1947, the employees of the Hawaiian Pineapple Company on the Island of Lanai, which is owned by the company, were on strike.

The population of Lanai is approximately 3,000 and is made up primarily of the employees of the company, including the 1,300 agricultural workers, members of the petitioning union, and their families.

Most of the employees live in the company town of Lanai City, which is inland about seven miles from the harbor where the harbor incident involving 47 of the individual petitioners occurred.

Present at the time were six police officers, a number of union men, spectators and eight company supervisors or executives. On the dock were 11 bins of six-day old pineapple picked before the strike. A barge dispatched from Honolulu arrived about 4:00 o'clock to pick up the pineapple.

The District Court notes that the evidence shows that a barge customarily carries 152 bins of pineapple, and that pineapple is customarily shipped within 48 hours after picking.

When the barge docked and the company supervisors started to load the pineapple, some of the union pickets crossed the kapu (no trespass) line and threw pineapples out of the bins and punched one of the supervisors and chased another of the company men operating the crane.

The evidence offered by respondents and accepted by the court in its findings shows at its very worst that two persons were assaulted and battered and some pineapples were thrown out of bins.

Three photographers, including one of the police officers, were stationed at various angles taking pictures. Pictures concededly taken at the harbor the morning of the incident

and after the incident was over were used for identification in the mass arrests that followed.

Eleven of the petitioners in 12,300 were arrested on the 15th and held incommunicado, and finally released on excessive bail on a charge of unlawful assembly and riot. About two weeks later, fifty-one additional persons, including thirty-six of the individual petitioners in 12,300, were arrested and charged with unlawful assembly and riot. Four were dropped before the preliminary hearing, and twelve thereafter. One also was dropped on the mistaken impression that he didn't belong to the union.

The second Lanai incident involved assault and battery on two non-union employees by the name of Kalua. Five of the individual petitioners were arrested, charged with unlawful assembly and riot as a result of this incident, and released on excessive bail of $1,000 each.

d. The Grand Jury Issue.

The District Court found that the evidence before the court showed that the 1947 Maui County Grand Jury was not impaneled in accordance with law. It found that although at the hearing of the challenges by certain of the individual petitioners at Number 12,300 but a limited review of the methods employed to select the grand jury was permitted, there was sufficient evidence in the record to demonstrate the erroneous method employed in selecting the grand jury.

The District Court found that 84% of the persons selected and listed for grand jury service 1947 came from the ranks of the employer-entrepreneur group and their salaried (non-labor) employees, and that all other groups in the community, including labor, had approximately a 16% representation, although male laborers in Maui County comprised 79% of the total male population of the County.

The District Court found that the haole (white) group

in Maui County comprised but about 3.6% of the population, but the grand jury contained twenty-one haoles or 42% of the list.

It found that the percentage of Koreans, Hawaiians, Puerto Ricans and Filipinos on the list was zero, and that Filipinos constituted the second largest national group in the County as well as in the Territory, there being over 10,000 Filipinos in the County. The court also found that petitioners had shown that there were qualified Filipinos.

The District Court found on the basis of the testimony of Jury Commissioner Pombo, as well as the composition of the grand jury, that petitioners had proved a deliberate exclusion of Filipinos from grand jury service as well as a deliberate weighting of the grand jury list in favor of haoles and business men and against the laboring men of the community.

It found that the selection of jurors was made primarily from persons personally known to the jury commissioners.

The District Court also found that the commissioners used a questionnaire requiring prospective jurors to state where they were born and the "nationality" of both parents; that the questionnaire was not shown to have been employed for any purpose within the law and was in derogation of Section 83 of the Hawaiian Organic Act requiring the selection of jurors without reference to the race or place of nativity of the jurors.

The District Court concluded that the method of selection of the 1947 Maui County Grand Jury, within principles well established and clearly defined by this Court, was in violation of the Fifth and Sixth Amendments and was not a fair cross-section of the community of Maui County.

e. Bad Faith of Prosecutions.

On the basis of the record before it, the District Court found that the criminal prosecutions against the individual

petitioners were carried on by respondents for the purpose of attack upon a labor movement rather than for the ends of justice. In reaching this conclusion, it relied on all facts found in the case, and cited specifically:

1. (a) The mass arrests shown by the record in the Paia incident, the harbor incident, and on Oahu;

(b) The naming of persons as defendants in criminal proceedings from photographs taken both prior and subsequent to incidents alleged as violations of the unlawful assembly and riot act;

(c) The fact that no arrests were made during the course of the incidents charged as violations of the unlawful assembly and riot act;

(d) The excessive bail required of many of the individual petitioners in the instant cases;

2. The fact that Assistant Chief Freitas read the loitering law and not the unlawful assembly and riot act to the strikers and did not contemplate the swearing out of a complaint against the individual petitioners under this act until instructed to do so by the prosecuting officers;

3. The repeated selection of the unlawtul assembly and riot act with its heavy penalties as vehicles for the prosecution of comparatively minor infractions of the criminal laws;

4. The haste with which prosecuting officers procured the second indictment against the individual petitioners in case Number 12,301 after the first indictment was held invalid by the Supreme Court of Hawaii;

5. The fact that these laws were not invoked except in connection with labor disputes during the life of the Territory;

6. The fact that the maximum penalty under the unlawful assembly and riot act was increased from five years imprisonment to twenty years imprisonment after a strike of Filipino workers in 1924.

f. Irreparable Injury, Exceptional Circumstances and Unconstitutionality of Statute.

On the basis of its findings of fact, the District Court found that exceptional circumstances existed and that an equitable cause of action had been made out.

The District Court found the unlawful assembly and riot act and conspiracy act of the Territory unconstitutional on their face; that the impact of the two statutes as employed and as about to be employed by the respondents is such as to disrupt immediately any substantial possibility or opportunity for genuine collective bargaining between the employers of the sugar and pineapple industries and their employees; that the very existence of these two statutes as well as the manner of their enforcement by respondents so heavily weighted the scale in favor of the employer and against the employee as to render fair collective bargaining a virtual impossibility; that on the basis of the evidence presented, equitable and amicable relations between employers and employees in Hawaii are impossible while the statutes stand; that the repercussions that arise from the enforcement of these statutes in Hawaii are such as to cause irreparable damage to all labor relations in Hawaii.

The District Court found other and equally cogent reasons why injunctions prayed for must issue, based upon the court's findings that the criminal prosecutions were not brought by respondents in good faith; and that the violation of federal rights implicit in the selection of the grand jury was such as to violate constitutional standards made explicit by rulings of this Court.

g. Decrees and Judgments of the District Court.

On the basis of its findings of fact and conclusions of law, set forth in its opinion, the District Court for the District of Hawaii, sitting *en banc,* made and entered its decree granting judgment to petitioners and declaring the unlawful assembly and riot act and the conspiracy act of Hawaii

void as unconstitutional, enjoining the prosecution of petitioners under any complaint or indictment based on these laws, and holding void the indictment in 12,301 because of the illegal constitution of the grand jury.

C. DECISION OF THE UNITED STATES COURT OF APPEALS.

The decision of the Court of Appeals was based on the following two legal rulings which are squarely in conflict with the decisions of this Court in *Hague v. CIO*, 307 U. S. 496, *Douglas v. Jeannette*, 319 U. S. 157, *American Federation of Labor v. Watson*, 327 U. S. 582, *Screws v. United States*, 325 U. S. 91, and *United States v. Classic*, 313 U. S. 299:

1. "The rule that equity jurisdiction does not extend to enjoining pending criminal prosecutions *has no exceptions*. No extraordinary circumstances will serve to create such jurisdiction." (R. 2022) [7]

[7] This ruling was predicated on the Court of Appeals' erroneous conclusion that the petitioners sought and the District Court granted relief only against pending criminal prosecutions, and hence the relief does not sound in the future. This is not correct. The complaint sought declaratory relief, and the evidence introduced and the facts found showed a pattern and policy of violations of the rights under criminal prosecutions both past and present, and a continuous threat of deprivation of rights if petitioners sought to use their constitutional and federally protected right to strike and to engage in picketing activities.

The decree of the District Court shows that the relief granted was more than relief against pending prosecutions. Thus, paragraph 10 of the District Court's decree of March 29, 1949, declared the unlawful assembly and riot act void as unconstitutional (R. 548). Paragraph 11 restrained the persons bound by the decree and their successors in office from proceeding with the prosecution commenced on July 16, 1947 against certain named plaintiffs, under any complaint or indictment based on the unlawful assembly and riot statute. Paragraphs 12 and 13 contained similar provisions with respect to other plaintiffs. At the time the decree was entered, there were no indictments pending in the courts of the Territory against the plaintiffs in No. 12,300, and the indictment No. 2365 in No. 12,301 was held void because of the manner in which the grand jury was constituted. Under the federal Constitution, as well as under

2. "No case has been called to our attention which has applied the trial court's theory that proof of bad faith in the criminal prosecution is sufficient to warrant enjoining the criminal proceedings." (R. 2015)

The Court of Appeals erroneously set aside the following findings of fact and conclusions in the District Court:

1. That there was bad faith in the criminal prosecutions complained of by petitioners (R. 480-482, 2017-2018).

2. That there was any effect on collective bargaining shown by petitioners similar to the facts in *American Federation of Labor v. Watson*, 327 U. S. 582 (R. 476-483, 2011-2014).

STATEMENT AS TO JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1951. Petition for rehearing was denied on May 25, 1951.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254 (1).

STATUTES INVOLVED

The issues raised involve:

a. The construction of Section 1797 of the Civil Rights Act of March 1, 1875, 8 U.S.C.A. 43, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or terri-

---

Territorial law, these plaintiffs could not be prosecuted for a felony except by indictment. Not only do the complaint and the decree of the District Court show that the scope of the relief sought was more than against pending criminal prosecutions, but the proof tendered and the findings of the District Court indicate that the subject matter of the controversy involved more than pending prosecutions.

If the decrees of the District Court had, on the basis of the facts found and its determinations of law, granted only declaratory relief, the result would have been the same, as the territorial courts would have been bound by the determination of federal law in a civil rights case of which the District Court has original jurisdiction.

tory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

b. The constitutionality of the unlawful assembly and riot act of the Territory of Hawaii, Chapter 277, Sections 11570-11584, Revised Laws of Hawaii 1945,[8] set forth in Appendix I.

c. The constitutionality of the conspiracy act of the Territory of Hawaii, Chapter 243, Sections 11120-11130, Revised Laws of Hawaii 1945,[9] set forth in Appendix II.

QUESTIONS PRESENTED

Does the federal district court in a suit brought to redress the deprivation of constitutional rights have jurisdiction to enjoin pending criminal prosecutions when there exists "exceptional circumstances" and "irreparable injury which is clear and imminent"? (*Douglas v. Jeannette,* 319 U. S. 157, 163.)

Have the petitioners made out a case entitling them to relief?

REASONS RELIED ON FOR THE GRANTING OF THE WRIT

I

The proposition of law relied on by the United States Court of Appeals for the Ninth Circuit, that equity jurisdiction does not extend to enjoining pending criminal prosecutions *has no exceptions,* is in conflict with the provi-

[8] Repealed by Act 62 of the Laws of the Territory of Hawaii, Regular Session 1949, except as to prosecutions against the individual petitioners.

[9] Repealed by Act 10 of the Laws of the Territory of Hawaii, Special Session of 1949, except as to prosecutions against the individual petitioners involved in these suits.

sions of Section 1797 of the Civil Rights Act of March 1, 1875, as interpreted by this Court, exemplified by this Court's ruling in *Douglas v. Jeannette,* 319 U. S. 157, and is in conflict with decisions of the United States Court of Appeals for the Third Circuit in *Cooper v. Hutchinson,* 184 F. (2d) 118, and *Stefanelli v. Minard,* 184 F. (2d) 575, cert. granted May 14, 1951, 341 U. S. 930, in both of which cases, the United States Court of Appeals for the Third Circuit upheld the power of the District Court under the Civil Rights Act, to enjoin pending criminal prosecutions in state courts when a case is within the scope of the Civil Rights Act and the requisites of equity jurisdiction, irreparable injury and exceptional circumstances are shown.

The pendency of certiorari in the *Stefanelli* case makes it imperative that certiorari be granted here to insure uniformity in the circuits. The *Stefanelli* case involves merely a gambling prosecution, whereas the principles of law involved in this case affect all the people of Hawaii and the rights of a large number of working people are in question.

If the interpretation adopted by the Court of Appeals is permitted to stand, the civil remedy provisions of the Civil Rights Act are emasculated, leaving state and territorial officers free to flaunt the Constitution with impunity.

II

The proposition of law relied on by the United States Court of Appeals for the Ninth Circuit, that bad faith in criminal prosecutions is not an exceptional circumstance sufficient to warrant enjoining criminal prosecutions, decides a federal question in conflict with the decisions of this Court in *Hague v. CIO,* 307 U. S. 466, *Douglas v. Jeannette,* 319 U. S. 157, *American Federation of Labor v. Watson,* 327 U.S. 582, and *Screws v. United States,* 325 U.S. 1, and is in conflict with a decision of the Sixth Circuit in *McShane*

v. Maldoven, 179 F. (2d) 425, involving a complaint for damages.

In support of its erroneous proposition, the Court of Appeals relies on *Kentucky v. Powers,* 201 U.S. 1, involving removal from state to federal courts, despite the holding of this Court in *Screws v. United States, supra,* that the strict test in removal cases has no application to cases under the Civil Rights Act.

Abuse of power under color of state or territorial law, such as bad faith criminal prosecutions, is one of the evils Congress sought to remedy by the Civil Rights Act.

III

The findings of the District Court, that the unlawful assembly and riot act and the conspiracy act are unconstitutional on their faces, that the grand jury of Maui County was composed in violation of constitutional requirements, and its finding of exceptional circumstances and irreparable injury, established a clear case entitling petitioners to the relief sought and granted them by the District Court.

IV

The findings of the District Court are supported by substantial evidence and the Circuit Court erred in setting them aside.

WHEREFORE, your petitioners pray that a writ of certiorari issue out of this Court to the United States Court of Appeals for the Ninth Circuit; that the order of the Circuit Court be reviewed and determined by this Court, and the order finally reversed, and the decrees of the District

Court affirmed, and that your petitioners be granted such other and further relief as may be proper.

DATED: Honolulu, T. H., this 8th day of August, 1951.

Respectfully submitted,

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary, Unincorporated Association and Labor Union, et al., Petitioners,

By BOUSLOG & SYMONDS
HARRIET BOUSLOG

By .....
Harriet Bouslog
Their Attorneys

SUBJECT INDEX

	Page
OPINIONS BELOW	23
JURISDICTION	24
STATEMENT OF THE CASES	24
REASONS RELIED ON FOR THE GRANTING OF THE WRIT	24
I. The ruling by the United States Court of Appeals for the Ninth Circuit, that equity jurisdiction does not extend to enjoining pending criminal prosecutions has no exceptions, is in conflict with the provisions of Section 1797 of the Civil Rights Act of March 1, 1875, as interpreted by this Court and is in conflict with the decisions of the United States Court of Appeals for the Third Circuit	24
II. The ruling by the United States Court of Appeals for the Ninth Circuit, that bad faith in criminal prosecutions is not an exceptional circumstance sufficient to warrant enjoining of criminal prosecutions, decides a federal question in a way in conflict with applicable decisions of this Court and is in conflict with the decision of the Sixth Circuit	29
III. The findings of the District Court, that the Unlawful Assembly and Riot Act and the Conspiracy Act are unconstitutional on their faces, that the grand jury of Maui County was composed in violation of constitutional requirements, and its finding of exceptional circumstances and irreparable injury, established a clear case for relief under the Civil Rights statute	32
A. The Unlawful Assembly Act of Hawaii Is Void on its Face	35
B. The Conspiracy Act of Hawaii Is Void on its Face	39
C. The Method of Selection of the Grand Jury Violates Constitutional Guarantees	42
D. Deprivation of Constitutional Rights	45
IV. The findings of the District Court are supported by substantial evidence and the Court of Appeals erred in setting them aside	47
APPENDIX III, Tables showing economic and racial composition of 1947 Maui Grand Jury	61

TABLE OF AUTHORITIES CITED

Cases	Page
American Federation of Labor v. Watson, 327 U.S. 582	33, 34, 45
Babcock v. Noh, 99 F. (2d) 738	27
Bomar v. Keyes, 162 F. (2d) 136	43
Bridges v. California, 314 U.S. 252	38
Burt v. City of N. Y., 156 F. (2d) 791	31
Cassell v. Texas, 339 U.S. 282	42
Chambers v. Florida, 309 U.S. 227	31, 32
Cooper v. Hutchinson, 184 F. (2d) 119	25, 27, 28, 43
Douglas v. Jeannette, 319 U.S. 157, 163-164	24, 25, 26, 30, 33
Ex Parte Young, 209 U.S. 123	27
Fannish v. Fannish, 195 F. (2d) 425	49
Fay v. New York, 332 U.S. 261	43
Fenner v. Boykin, 271 U.S. 240	27
Grosjean v. American Press Co., 297 U.S. 233	38
Hague v. CIO, 307 U.S. 496	27, 33, 38
Imperial Assurance Co. v. Supornick, 184 F. (2d) 930	49
International Union v. Wisconsin Board, 336 U.S. 245	47
Kentucky v. Powers, 201 U.S. 1	30
Lane v. Wilson, 307 U.S. 268	43
McShane v. Maldoven, 179 F. (2d) 1016, 1020 (CCA 6)	31
Near v. Minnesota, 283 U.S. 697	38
Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290	29
Patton v. Mississippi, 332 U.S. 463	42, 43
Picking v. Pennsylvania R.R., 151 F. (2d) 240 (CCA 3), cert. den. 332 U.S. 776	31
Public Utilities Com. v. United Fuel Gas Co., 317 U. S. 456	49
Ross v. Texas, 341 U.S. 918	42
Screws v. United States, 325 U.S. 91	30, 32, 34
Shepard v. Florida, 341 U.S. 50	42
Siler v. Louisville & N.R. Co., 213 U.S. 175, 191	45
Snowden v. Hughes, 321 U.S. 1	31
Stefanelli v. Minard, 184 F. (2d) 575	25, 29
Strauder v. West Virginia, 100 U.S. 303	42
Terrace v. Thompson, 263 U.S. 197	27
Territory v. Kaholokula, 37 Haw. 625	28
Territory v. Soga, 20 Haw. 71	40, 41
Thiel v. Southern Pacific Co., 328 U.S. 217	42, 44
United States v. Classic, 313 U.S. 299	31

TABLE OF AUTHORITIES CITED

Cases

	Page
United States v. L. Cohen Grocery Co., 255 U.S. 81	41
U. S. Cartridge Co. v. Powell, 185 F. (2d) 67	49
Watson v. Buck, 313 U.S. 387	37
Williams v. United States, 341 U.S. 97	32
Yick Wo v. Hopkins, 118 U.S. 356	31

Statutes

Constitution of the United States:	
First Amendment	38
Fourth Amendment	29, 40, 41
Fifth Amendment	43
Fourteenth Amendment	31
Civil Rights Act	24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 43, 47
8 U.S.C.A. 43, §1797	24, 25, 26, 30
Judicial Code:	
28 U.S.C. 1254 (1)	24
28 U.S.C.A. 1343	30
28 U.S.C. 2283, formerly 28 U.S.C. 379	26, 27, 28
Federal Rules of Civil Procedure:	
28 U.S.C.A. 52 (a)	48
Hawaiian Organic Act	35, 36
Revised Laws of Hawaii 1945:	
Conspiracy Statute, Chapter 243, Sections 11120-11130	32, 39, 41, 42
Unlawful Assembly and Riot Statute, Chapter 277, Sections 11570-11584	32, 34, 35, 36, 37, 39, 41, 45
Riot Act of George I, stat. 2, c. 5	38

Texts

Encyclopedia of Federal Procedure, Vol. 13, Sec. 6559, 6675	28
Moore's Commentary on the United States Judicial Code, 1949, Sec. 03 (30), pages 257-258	30

IN THE

Supreme Court of the United States

October Term 1951

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary Unincorporated Association and Labor Union, et al., *Petitioners,* vs. WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, et al., *Respondents.*	No.....

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary Unincorporated Association and Labor Union, et al., *Petitioners,* vs. WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, et al., *Respondents.*	No.....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported in 187 F. (2d) 860, and is set forth in the transcript of the record at pages 2006-2025.

The opinion of the United States District Court for the District of Hawaii, sitting *en banc,* is reported in 82 F. Supp. 65, and is set forth at pages 370-520 of the transcript of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1951. Petition for rehearing was denied on May 25, 1951.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254 (1).

STATEMENT OF THE CASES

A Summary Statement of the Matter Involved is set forth in the Petition, supra, pages 2 to 17.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT

I. THE RULING BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THAT EQUITY JURISDICTION DOES NOT EXTEND TO ENJOINING PENDING CRIMINAL PROSECUTIONS HAS NO EXCEPTIONS, IS IN CONFLICT WITH THE PROVISIONS OF SECTION 1797 OF THE CIVIL RIGHTS ACT OF MARCH 1, 1875, AS INTERPRETED BY THIS COURT AND IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The primary legal ground stated by the United States Court of Appeals for reversing the District Court was:

> The rule that equity jurisdiction does not extend to enjoining pending criminal prosecutions, has no exceptions. No extraordinary circumstances will serve to create such jurisdiction. (R. 2022) [1]

The holding is in conflict with Section 1797 of the Civil Rights Act of 1875, 8 U. S. C. A., Section 43, under which this suit was brought, and with the decisions of this Court interpreting that section as exemplified in *Douglas v. Jeannette,* 319 U. S. 157. The ruling is also in conflict with decisions of the United States Court of Appeals for the Third

[1] That this proposition, even if it were correct, does not apply to the instant cases is shown in Footnote 7 of the petition, *supra,* p. 16.

Circuit in *Cooper v. Hutchinson,* 184 F. (2d) 119, and *Stefanelli v. Minard,* 184 F. (2d) 575, *certiorari* granted May 14, 1951, No. 458 in the records of this Court, in both of which cases the Court of Appeals for the Third Circuit upheld the power of District Courts under the Civil Rights Act to enjoin pending criminal prosecutions in state courts where a case is made out under the Civil Rights Act and the conditions of equitable jurisdiction, irreparable injury and exceptional circumstances, are met.

Section 1797 of the Civil Rights Act provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

On its face this section gives the District Courts jurisdiction to grant injunctive relief in that class of cases in which, under color of state or territorial law, persons are deprived of rights, privileges or immunities secured by the Constitution and laws of the United States. In interpreting this Section in *Douglas v. Jeannette,* 319 U. S. 157, 163-164, this Court said:

> We think it plain that the district court had jurisdiction to hear and decide the question of the validity of the ordinance, though there was no allegation or proof that the matter in controversy exceeded $3,000. (Citing and quoting 8 U.S.C.A., Section 43.)
>
> * * *
>
> Allegations of fact sufficient to show deprivation of the right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right granted by the Fourteenth Amendment, and to state a cause of action under the Civil Rights Act, when-

> ever it appears that the abridgment of the right is effected under color of a state statute or ordinance. It follows that the bill, which amply alleges the facts relied on to show abridgment by criminal proceedings under the ordinance, sets out a case or controversy which is within the adjudicatory powers of the District Court. Notwithstanding the authority of the District Court, as a federal court to hear and dispose of the case, petitioners are entitled to the relief prayed only if they establish a cause of action in equity.

The District Court and the Court of Appeals each relied on the *Jeannette* case to support its point of view, but reached widely differing interpretations of what this Court meant.

If the interpretation adopted by the Court of Appeals is permitted to stand, the Civil Rights Act is emasculated, and its effectiveness to carry out the great purposes for which it was enacted has been seriously weakened. This Court has already placed adequate safeguards around the use of the injunctive power in its strict requirements of exceptional circumstance and irreparable injury, great and immediate. The decision of the Court of Appeals, however, closes the door to relief in cases involving pending prosecutions, no matter how great and immediate the irreparable injury shown nor how persuasive the exceptional circumstances. It places the power of state and territorial officers, acting in abuse of their power and violating constitutional guarantees above the Constitution and beyond the power of federal courts.

The great divergence of interpretation of the District Court and the Court of Appeals of the meaning of *Douglas v. Jeannette* seems to spring from a basic difference in the construction of Section 1797 of the Civil Rights Act and the effect given to it in conjunction with other laws. The Court of Appeals found it unnecessary to decide whether Section 2283 of Title 28 is a bar to injunctive relief sought under

the Civil Rights Act against pending prosecutions. Yet it supports its view that the power of equity does not extend to enjoining pending criminal proceedings by citing cases in which Section 2283 or its predecessor was applicable, none of which were brought under the Civil Rights Act.[2] This Court by inference held civil rights suits an exception to the predecessor of Section 2283 in *Hague v. CIO,* 307 U.S. 496, and the United States Court of Appeals for the Third Circuit specifically so held in *Cooper v. Hutchinson,* 184 F. (2d) 119, saying:

> But appellants say that their right to assert a claim under Section 1 of the Civil Rights Act of 1871 is not dependent upon the prior pursuit of relief under state law. That is correct. *Lane v. Wilson,* 1939, 307 U. S. 268, 274-275, 59 S. Ct. 872, 83 L.Ed. 1281. We are not here governed by the rule of the habeas corpus cases to the effect that the state law processes must be exhausted before there can be resort to a federal court. And the provision in the Judicial Code forbidding the use of the injunction against state court action has a stated exception when a federal statute allows it, as it does here.[11]
>
> [11] 28 U.S.C.A. § 2283 (1946 Supp. III): "A Court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Civil Rights Act provision relied upon here expressly provides for a "suit in equity" by the aggrieved party. Rev. Stat. § 1979 (1875), 8 U.S.C.A. § 43.

[2] The Court of Appeals cites *Ex Parte Young,* 209 U.S. 123, *Fenner v. Boykin,* 271 U.S. 240; *Terrace v. Thompson,* 263 U.S. 197, and its own decision in *Babcock v. Noh,* 99 F. (2d) 738. It is to be noted that the relief granted in the instant cases by the District Court would be in conformity with the general equity rules cited by this Court in the opinions cited under the declaratory relief given without reference to the criminal prosecutions. See also, Note 7, p. 16, *supra.*

It is impossible, as the Court of Appeals sought to do, to separate the generally stated rule against enjoining pending criminal prosecutions, and Section 2283, of the New Judicial Code, formerly Section 379 of Title 28. The prohibition of this section has been a part of the Judicial Code since the creation of courts of the United States. It has been said that the distinction drawn by federal courts between threatened and pending criminal prosecutions arose in order to evade a direct collision with the language of the prohibition on the theory that prosecutions merely threatened and not yet brought were not "state court proceedings" within the meaning of the prohibition of the statute.[3]

In *Cooper v. Hutchinson, supra,* where a stay of pending state court criminal action was sought under the Civil Rights Act, in order to secure in the state courts the constitutional right to counsel of the defendant's choice, the Court of Appeals for the Third Circuit specifically held that federal courts had jurisdiction to stay pending criminal proceedings, but under the circumstances in the case found it unnecessary to exercise the power until satisfied that the state court would not on interlocutory appeal protect petitioner's federal rights as defined in its opinion. It retained jurisdiction, however, to determine whether the deprivation of constitutional rights complained of was remedied by the state court on interlocutory appeal.

In the instant cases, the Supreme Court of the Territory had by interlocutory appeal (*Territory v. Kaholokula, supra*) passed on the issue of the constitutionality of the unlawful assembly act, and the circuit court had passed on the grand jury act, and had failed to accord relief from the deprivation of rights complained of. Petitioners have done all they can to get relief under territorial law and cannot get it. Thus "rules of comity or convenience must give way

[3] Encyclopedia of Federal Procedure, Vol. 13, Sec. 6559, Sec. 6675.

to constitutional rights." *Oklahoma Natural Gas Co. v. Russell,* 261 U. S. 290.

In *Stefanelli v. Minard, supra,* the United States Court of Appeals for the Third Circuit affirmed in a *per curiam* opinion, the dismissal by the District Court of a civil rights suit seeking an injunction against the use in pending criminal prosecutions for gambling in the state court of papers and documents seized by state officers under color of state law in violation of the prohibition of the Fourth Amendment against unreasonable searches and seizures. The appellate and Supreme Courts of New Jersey had in prior case ruled admissible in criminal prosecutions illegally obtained evidence if the fruits of the search and seizure were evidential *per se.* The Court of Appeals indicated no doubt of the jurisdiction to grant the relief prayed, but sustained the withholding of the exercise of jurisdiction because no exceptional circumstances or irreparable injury were shown. This court granted *certiorari* on May 14, 1951.

The instant cases involve equally clear violation of constitutional rights and show a similar refusal by the territorial courts to accord these rights. In addition exceptional circumstances and irreparable injury are clearly shown. Petitioners have a stronger claim to relief by the granting of the writ than existed in the *Stefanelli* case.

II. THE RULING BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THAT BAD FAITH IN CRIMINAL PROSECUTIONS IS NOT AN EXCEPTIONAL CIRCUMSTANCE SUFFICIENT TO WARRANT ENJOINING OF CRIMINAL PROSECUTIONS, DECIDES A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND IS IN CONFLICT WITH THE DECISION OF THE SIXTH CIRCUIT.

The proposition of law relied on by the United States Court of Appeals for the Ninth Circuit that bad faith in criminal prosecutions is not an exceptional circumstance

sufficient to warrant the enjoining of criminal prosecutions brought under and within the scope of the Civil Rights Act is in conflict with the Civil Rights Act as interpreted by this Court and with the decisions of this Court.

The District Court found that the criminal prosecutions complained of were not brought in good faith and were being carried on for the purpose of an attack upon a labor movement rather than for the ends of justice. Its findings of bad faith were based on the whole record as well as specific facts enumerated in the opinion and set forth *supra*, page 14.

On the basis of the statement of this Court in *Douglas v. Jeannette* that "No person is immune from prosecutions in good faith for his alleged criminal acts," the District Court found that bad faith in the prosecution was an exceptional circumstance which could be taken into account, with other exceptional circumstances, to warrant granting the injunctive relief prayed.

The Court of Appeals, relying on *Kentucky v. Powers,* 201 U.S. 1, and rejecting the textual interpretation of this language by the District Court, concluded that the language quoted did not mean to imply the obverse, that a person is immune from prosecutions in bad faith, and could, under the Civil Rights Act, seek injunctive relief for deprivation of his constitutional rights.

Kentucky v. Powers, supra, is a case involving removal from the state to federal courts. The strict test required in removal cases is not applicable to cases in which the United States District Courts are given original jurisdiction as in Section 43 of Title 8 and Section 1343 of the New Judicial Code.[4] In *Screws v. United States,* 325 U.S. 91, which upheld the criminal conspiracy section of the Civil Rights Act, this Court specifically rejected the strict test of removal cases in proceeding arising under the Civil Rights Act. Un-

[4] Moore's Commentary on the United States Judicial Code, 1949, Section 03(30), pages 257-258.

questionably, the criminal sections are in *pari materia* with the sections affording civil relief. *McShane v. Maldoven,* 179 F. (2d) 1016, 1020 (C.C.A. 6); *Picking v. Pennsylvania R. R.,* 151 F. (2d) 240 (C.C.A. 3), cert. den. 332 U.S. 776.

In *United States v. Classic,* 313 U.S. 299, this Court said:

> Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken under color of law.

And in *Snowden v. Hughes,* 321 U.S. 1, this Court stated that a showing of willful discrimination in the enforcement of state law, fair on its face, constituted denial of equal protection for which redress could be sought under the Civil Rights Act. *A fortiori* discrimination under an invalid law would likewise. See also, *Burt v. City of N. Y.,* 156 F. (2d) 791.

Abuse of power by state officers even under an ordinance fair on its face but enforced in a discriminatory manner has been stricken down by this Court. *Yick Wo v. Hopkins,* 118 U.S. 356.

In *McShane v. Maldoven,* 179 F. (2d) 1016, the United States Court of Appeals for the Sixth Circuit held that a complaint for damages under the Civil Rights Act states a cause of action where it alleged that state officers and others combined to deprive appellant of rights secured by the Fourteenth Amendment by unlawfully arresting and imprisoning her and subjecting her to a fraudulent criminal trial under color of the laws of Michigan.

In *Chambers v. Florida,* 309 U. S. 227, involving the legality of a confession extorted by violence, it was held that "dragnet" methods of arrest on mere suspicion without warrant, coupled with protracted questioning of the accused over a period of five days by persons in authority constituted a violation of due process under the Fourteenth Amendment. This Court said:

> The due process provision of the Fourteenth Amendment was intended to guarantee procedural standards adequate and appropriate then and thereafter to protect *at all times* persons charged with or suspected of crime by those holding positions of power and authority.

The similarity of the circumstances relied on by the District Court to show bad faith to those in the *Chambers* case are apparent.

It seems a novel contention advanced by the Court of Appeals that the opposite or obverse of prosecution in good faith is not prosecution in bad faith. The latter type would seem to be just the kind of deprivation the Civil Rights Act was intended to afford relief against. If, as this Court held in *Screws v. United States,* bad motives and abuse of power on the part of law enforcement officers justify their conviction under the criminal conspiracy section of the Civil Rights Act, *a fortiori* it should in an appropriate case constitute grounds for injunction under the civil remedy provisions.

See also *Williams v. United States,* 341 U.S. 97.

III. THE FINDINGS OF THE DISTRICT COURT, THAT THE UNLAWFUL ASSEMBLY AND RIOT ACT AND THE CONSPIRACY ACT ARE UNCONSTITUTIONAL ON THEIR FACE, THAT THE GRAND JURY OF MAUI COUNTY WAS COMPOSED IN VIOLATION OF CONSTITUTIONAL REQUIREMENTS, AND ITS FINDING OF EXCEPTIONAL CIRCUMSTANCES AND IRREPARABLE INJURY, ESTABLISHED A CLEAR CASE FOR RELIEF UNDER THE CIVIL RIGHTS STATUTE.

Petitioners' theory of their case, as set forth in their complaint and as presented and argued before the District Court at every stage of the proceeding, and in the presentation of evidence of deprivation of federal rights, bad faith in the prosecutions and denial of equal protection of the laws, was based squarely on rules laid down in the decisions of this

Court in *Hague v. CIO,* 307 U.S. 496, *Douglas v. Jeannette,* 319 U.S. 157, and *American Federation of Labor v. Watson,* 327 U.S. 582.

In *Hague v. CIO,* this Court held that federal courts have jurisdiction of suits brought under the Civil Rights Act, without regard to jurisdictional amount, to redress the deprivation of federal rights. This Court declared void on their face and restrained the enforcement of two ordinances of Jersey City, one of which required permits to be obtained for the holding of parades and public assemblies, and authorized the Director of Public Safety to refuse a permit only for the purpose of preventing riots, disturbances and disorderly assemblages.

In *Douglas v. Jeannette,* this Court again held that federal district courts have jurisdiction of suits for injunction brought under the Civil Rights Act, without regard to jurisdictional amount, to redress the deprivation of federal rights under an unconstitutional ordinance and to restrain its enforcement. Notwithstanding the authority of the District Court to hear and decide the case, this Court said that as a matter of discretion federal courts should refuse to interfere with criminal proceedings in state courts "save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent."

Petitioners met every standard laid down by the Court for an exceptional case.

First, this Court said that courts of equity do not ordinarily restrain criminal prosecutions since no person is immune from criminal prosecutions in good faith for alleged criminal acts, and the constitutionality can be as readily determined in the criminal case as in the suit for injunction.

This petitioners met by showing that respondents were not acting in good faith in arresting and prosecuting petitioners under color of the unconstitutional laws complained

of, and that the grand jury to which respondents presented or threatened to present these purported charges was illegally constituted.

Petitioners showed that the question of constitutionality could not be as readily determined in the criminal proceedings since the Territorial Supreme Court had upheld the unlawful assembly statute as valid on its face and had in effect broadened its scope in a proceeding from which no appeal could be prosecuted.

Second, this Court said that the state courts are the final arbiters of the meaning and application of the statute. Here, the Territorial Supreme Court had already interpreted both statutes and held them valid, so that a decision as to whether the statute, as so interpreted, was valid was ripe for federal decision.

Third, this Court said that the arrest by federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court, are to be supported only on a showing of danger of irreparable injury both great and immediate.

What constitutes a showing of irreparable injury this Court made specific in *American Federation of Labor v. Watson*. There, this Court held that the impact upon a labor union and the threat of disruption of a system of collective bargaining protected by federal law was such as to meet this strict test. The District Court found petitioners' evidence met this test.

In *Screws v. United States*, 325 U.S. 91, in upholding the criminal conspiracy section of the Civil Rights Act — which is in *pari materia* with the section affording civil relief — this Court said that "to deprive a person of a right which has been made specific either by express terms of the Constitution or laws of the United States or by decisions" of the Supreme Court interpreting them supplied the specific in-

tent necessary to constitute willful deprivation of rights. A local officer, this Court said, who persists in enforcing a type of ordinance which the Supreme Court has held invalid as violative of the guarantees of free speech or freedom of worship, or a local official who continues to select juries in a manner which flies in the teeth of decisions of the Supreme Court knows exactly what he is doing.

> He violates the statute not merely because he has a bad purpose, but because he acts in defiance of announced rules of law. He who defies a decision interpreting the constitution knows precisely what he is doing.

Under these decisions of this Court, the petitioners are entitled to the relief prayed as a) the Territorial statutes complained of were void and unconstitutional, b) the method of selection of juries complained of was in violation of explicit decisions of this Court, and c) they showed exceptional circumstances and irreparable injury.

A. The Unlawful Assembly Act of Hawaii Is Void on Its Face.

The unlawful assembly and riot act of the Territory of Hawaii was promulgated in the Penal Code of the Hawaiian Islands adopted by the House of Nobles and Representatives on June 21, 1850. It predates the Hawaiian Constitution of 1852 by at least two years, and the time when the Constitution of the United States was made applicable to the Territory under the Hawaiian Organic Act by at least fifty years.

This act was the natural and necessary concommitant of the indentured servitude established by law in the Hawaiian Kingdom which existed for the fifty years preceding the annexation of Hawaii to the United States.[5]

---

[5] An instance of the use of the Riot Act against contract laborers appears in the 1897 Report of the Bureau of Immigration for the Biennial Period Ending December 31, 1897. At pages 8-9, Wray Taylor, Secretary of the Board of Immigration, reported:

> On April 21, 1897, I visited Lihue Plantation, Kauai, for the purpose of investigating causes that led up to a riot there, and which resulted in the death of a Chinese contract laborer, and

Although this slavery was prohibited by the Organic Act, official government reports indicate that so strong were the habits and attitudes of mind characteristic of both servant and master under such a system, that conditions of labor changed little until far into the twentieth century,[6] and the use of the unlawful assembly act in labor disturbances continued up to and including the 1946 and 1947 strikes, and the bringing of this suit.

---

the arrest of fifteen others on a charge of rioting. Mr. Goo Kim, the Chinese Commercial Agent, had previously made a complaint that the Chinese laborers were not treated well at Lihue and requesting an investigation.

I spent two days at Lihue thoroughly enquiring into the matter, and on my return, requested that the head luna, Mr. Zoller, be discharged at once and that Manager Wolters be reprimanded and held to strict account for the better treatment of the laborers in the future. This was done and since then no further complaints have come from Lihue. Fifteen ringleaders in the riot were by order of the Court, returned to China.

According to the Report of the Attorney General of Hawaii for the Biennial Period Ending March 31, 1890, there were 7,612 male contract laborers in Hawaii. During that year, there were 5,706 arrests for deserting servitude and 5,389 convictions.

Whenever disturbances occurred on plantations in protests over conditions and wages, the leaders were charged with riot. Even if improvements in conditions resulted, the leaders of the "riots" were usually always deported.

[6] Labor organizations in the Territory of Hawaii made little progress until 1945. That this was due in no small part to a suppression of labor's rights is indicated by official U. S. government reports. Thus, a report of the United States Department of Labor, Bulletin 534 of the Bureau of Labor Statistics, Labor Conditions in the Territory of Hawaii, 1929-1930, states:

> Labor organizations in the Hawaiian Islands are few in number, small in membership, and with the exception of the barbers' union, have no agreements with the employers. (Page 117.)

A succeeding Labor Department Report in 1939, entitled Labor in the Territory of Hawaii, 1939, 76th Congress 3rd Session, House Document No. 848, Bulletin No. 687, United States Department of Labor, Bureau of Labor Statistics, states:

> The high degree of intercorporate control makes it possible to mobilize the resources of all large enterprises to restrict the growth of labor unions and to combat strikes in whatever fields of industry they may occur. There is a tendency on the part of

In *Watson v. Buck*, 313 U.S. 387, this Court stated that:

> It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

The Unlawful Assembly and Riot Statute, Chapter 277, Revised Laws of Hawaii, repealed except as to the petitioners in these cases, is such a statute.

---

management to assume that unionism is synonymous with dangerous radicalism, possibly because the labor movement in Hawaii has not always been wisely led. The result of this attitude is the feeling that labor unionism is a common menace to all Hawaiian enterprise, and that the duty of combating its development is a common problem of the management of all industries whenever labor trouble occurs. Thus, although management has done much for labor in Hawaii, it has used every influence at its command to restrict labor organization.

* * * *

The position of the individual plantation worker is especially vulnerable. The house in which he lives, the store from which he buys, the fields in which he finds his recreation, the hospital in which he is treated, are all owned by plantation management, which in turn has its policies controlled from the offices of the factors in Honolulu.

Whether it is justified or not, there is a prevalent feeling among the majority of Hawaiian workers that a bad record with any important concern in the Territory makes it difficult to obtain employment in any other concern, and that to be associated with labor union activities is certain to weaken their employment opportunities, if not destroy their economic future (Page 198).

* * * *

In comparison with the highly integrated character of industrial management, the organization of labor in the Territory is meager.

To understand the development of labor organization in Hawaii, it is necessary to remember that in less than 70 years the population has increased from 56,000 (in 1872) to well over 400,000 * * * * * (Page 199).

The total membership of all unions in the Territory has been increasing. Accurate figures are not available. Estimates of total membership by union officials vary from 3,500 to 6,000 members. Even if the larger figure is accepted as accurate, it would indicate that less than one twenty-fifth of the gainfully employed are unionized (Page 203).

In *Near v. Minnesota,* 283 U.S. 697, and *Grosjean v. American Press Co.,* 297 U.S. 233, this Court warned in clear and unequivocal language that the common law of England in respect to free speech, free thought, free assembly and religion was not ours and was specifically rejected by the framers of the First Amendment.

The first case to challenge directly the police power of the state to place previous restraints on free speech under the guise of legislating against riots and unlawful assemblies was *Hague v. CIO,* 307 U.S. 496. Although the Court several years earlier in the *Davis* case had upheld the power of Massachusetts to prohibit if it saw fit assemblies on the Boston Common, in the *Hague* case the Court held void on its face and restrained the enforcement of an ordinance of Jersey City which authorized the Director of Public Welfare to issue permits for meetings in parks although his power to deny permits was strictly limited to cases where he felt it necessary for the prevention of riots, disturbances and disorderly assemblies.

In *Bridges v. California,* 314 U.S. 252, this Court said in specific language, that the restrictions on assembly prevalent in England at the time of the adoption of the Bill of Rights, specifically, the Riot Act of George I, stat. 2., c. 5., were measures which the Constitution prohibited the American Congress from passing.

The District Court, in striking down the statute as unconstitutional on its face, found a startling resemblance between the two, with the scales weighted more heavily in favor of assembly in the Riot Act of George I than in the Act adopted in 1850 by the King-appointed House of Nobles and Representatives of the Kingdom of Hawaii.

The declaration of unconstitutionality by the Court in the *Bridges case* could not be more clear and explicit. The Court said:

> In any event it need not detain us, for to assume that the English common law in this field became ours is to

> deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' (Citations.) . . .
> No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath or *the restrictions* upon assembly* then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing . . .
> * Geo. I., stat. 2, c. 5, cf. also 36 Geo. III, c. 8, and discussion in I Buckle, *History of Civilization in England,* 351.

Petitioners thus met their burden of showing the unconstitutionality of the unlawful assembly and riot act.

B. The Conspiracy Act of Hawaii Is Void on Its Face.

The conspiracy act of the Territory was likewise held void on its face by the District Court. (R. 461-467.)

This statute also is a product of the 1850 penal code. It has been consistently and persistently used against workers in every labor dispute since its adoption. Indeed, early strikes were referred to by the newspapers and the courts as "Higher Wage Conspiracies."

Respondents conceded below that the statute is void in part, but contended that the District Court should not have stricken the statute down *in toto,* but should have separated the void from what they contend is the valid part.

They conceded that the indictment against petitioners at 12,301 was based on both the void and valid parts. The indictment charges that petitioners conspired to beat and bruise the five named persons and to injure them by impoverishing them. According to respondents' witness, Mr. Freitas, no assault and batteries occurred. The 1946 indict-

ment charged merely assaults and shoving and pushing, but not directed against the five named men. (R. 12,301, 32-34)

The Supreme Court of the Territory had long upheld the constitutionality of the conspiracy act. In *Territory v. Soga,* 20 Haw. 71, it upheld a conviction of third degree conspiracy against four of the strike leaders. Each was sentenced to ten months imprisonment, $300 fine, and one-fourth of the costs.

Soga was a newspaper editor, and so was Negoro. The means used in the conspiracy were newspaper articles agitating for higher wages.

The charge against the defendants was concerting together:

> to do what plainly and directly tended to incite and occasion offense and to do what was obviously and directly injurious to another

by conspiring to prevent certain corporations owning sugar plantations in the County of Honolulu from carrying on their business and operating their plantations, and thereby impoverishing them by preventing them from carrying on their trade or business. The means charged were threats of violence directed against the corporations and all Japanese in the City and County who did not join with the Higher Wage Association.

The evidence in support of the threats of violence were articles appearing in a Japanese newspaper, the *Nippu Jiji,* in support of the Association which urged "sticking together" to secure higher wages, "whatever the consequences", and other implied threats, which the conspirators did not denounce; letters received by leaders from members of the Association counseling force, which letters were procured from a safe stolen from one of the so-called conspirators with the assistance of the police, in a search and seizure clearly in violation of the Fourth Amendment; a draft of a play attacking an opponent of the strike—likewise found in

the stolen safe; and speeches made by the conspirators "intended to stir up the laborers."

It is of interest to note that the Territorial Supreme Court apparently did not consider the Fourth Amendment applicable in the Territory.

The conspiracy statute of the Territory is capable of being interpreted and was interpreted by the respondents in exactly the same way in which the unlawful assembly and riot statute was construed — to convert any picket line or concerted activity in a labor dispute into criminal activity for all so engaged if any single act of any individual or individuals makes it possible to do so. The common intent to picket is construed as being sufficient to give a common intent, a concurrence in intent or a combining together, sufficient to make all present, if any infraction of any law occurs, guilty of unlawful assembly and riot and conspiracy.

A mere reading of the conspiracy statute of the Territory shows that it is unconstitutional on its face because it provides no standard of conduct. As here applied, and as applied in *Territory v. Soga,* it is clear that it is also a threat to freedom of assembly and speech.

Section 1 of the statute (11120) defines a conspiracy as a "malicious or fraudulent combination or mutual undertaking, or concerting together of two or more . . . to do what plainly and directly tends to excite or occasion offense, or what is obviously and *directly* wrongfully injurious to another." The second paragraph of this section clarifies this by explaining that it is a conspiracy "to prevent another, by *indirect and sinister* means, from exercising his trade, and to impoverish him." The only standard laid down by the statute is a gastronomic test of the prosecuting officers in the first instance and the jurors thereafter.

The statute clearly purports to embrace more than criminal acts; it attempts to embrace moral judgments as well. It does not require a wilful doing of the acts charged as a conspiracy or that they be legally wrong.

In *United States v. L. Cohen Grocery Co.,* 255 U.S. 81,

an act of Congress was struck down because its enforcement would have been "the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." The act declared criminal the making of "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."

The conspiracy statute contains no definition or standard for determining what is meant by "or to do what plainly tends to excite or occasion offense, or what is obviously and directly wrongfully injurious to another." It does not refer to any source where these questions can be determined. The legislature did not define what it desired to punish, but referred the citizen to his own conscience and to a law library in order to ascertain what acts were prohibited. To enforce such a statute would be like sanctioning the practice of Caligula who "published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it."

On its face and as construed by the Supreme Court of Hawaii, the conspiracy act becomes infirm in all its parts.

C. The Method of Selection of the Grand Jury Violates Constitutional Guarantees.

Petitioners met with exactitude the quantum of proof held by this Court sufficient to show a deliberate and substantial exclusion from the grand jury list of persons on account of race, in a long line of cases from *Strauder v. West Virginia,* 100 U.S. 303, through *Patton v. Mississippi,* 332 U.S. 463. Petitioners presented a stronger case than appeared in *Cassell v. Texas,* 339 U.S. 282. See also *Ross v. Texas,* 341 U.S. 918, and *Shepard v. Florida,* 341 U.S. 50.

Petitioners showed exclusion of wage earners under the test laid down in *Thiel v. Southern Pacific Co.,* 328 U.S. 217.

Petitioners showed that the 1947 grand jury was illegally

composed within the principles laid down in *Fay v. New York,* 332 U.S. 261, for a blue-ribbon grand jury which could not be used in the Territory, since Hawaii is governed by the Fifth Amendment.[7]

The District Court held that petitioners had no opportunity to challenge the grand jury under the circumstances in which respondents procured their indictment, and that it was doubtful if territorial law afforded petitioners a remedy. The District Court held it had jurisdiction to hear and decide the question presented, which was whether the petitioners were being deprived of federal rights. The District Court further held that even if this were not so, since it had acquired jurisdiction, on adequate grounds, that its decision should not be truncated.

Under the Civil Rights Act, one may sue to redress deprivation of a federal right even without exhausting remedies under state law. *Lane v. Wilson,* 307 U.S. 268, *Bomar v. Keyes,* 162 F. (2d) 136, *Cooper v. Hutchinson,* 184 F. (2d) 119. The denial of a fair and representative grand jury is *per se* a denial of equal protection of the laws. It is to be noted that the relief sought is declaratory and not injunctive, and that a real controversy exists, the petitioners having been indicted. It is also true that the denial of this right leaves the state court without jurisdiction to try a defendant under an indictment returned by such a grand jury. *Patton v. Mississippi,* 332 U.S. 463.

A showing that there has been no Filipino on the grand jury of Maui County in thirty years; that Filipinos constitute twenty per cent of the population of the County; that there are qualified Filipinos; that jury questionnaires of Filipinos showing the same qualification as persons selected for jury service were marked "not qualified" and questionable; and the testimony of a jury commissioner that no Filipinos were selected because they had men that were bet-

[7] Tables submitted to the Court showing composition of the jury racially and economically are set forth in Appendix III.

ter; when a large number of the individual petitioners are Filipinos, is a sufficiently clear showing to bring petitioners explicitly within the scope of decisions of this Court declaring such exclusion and discrimination a violation of constitutional rights.

A showing that 84 per cent of a jury list is composed of representatives of the employer-entrepreneur group which comprises 15 per cent of the community and that the same percentages existed for at least the past five years, coupled with a showing by testimony of a jury commissioner that business men and their employees were better jurors than truck drivers, that male workers constituted 79 per cent of the population and that there were no agricultural workers on the list although 49 per cent of the population were agricultural laborers and all of the individual petitioners belong to the excluded class is a sufficiently clear showing to warrant a conclusion that there was a deliberate and substantial weighting of the jury in favor of business men and against laborers and to condemn the method of selection as a denial of a grand jury properly constituted within the rule of the *Thiel* case.

A showing that the grand jury list contained 42 per cent haoles — defined as Caucasians exclusive of Portuguese — and with a gloss of rank or economic status — when haoles constituted only 3.5 per cent of the community, coupled with the testimony of a jury commissioner that he selected haoles because they wanted to run the country and they owned the country and that all the individual petitioners were non-haole was a sufficiently clear showing to warrant a finding of deliberate and substantial weighting of the jury based on race and economic status and to condemn a jury so selected as discriminatory.

Even if the other federal questions raised were decided adversely to the petitioners, they are entitled to the declara-

tory relief prayed in respect to the grand jury. *Siler v. Louisville & N. R. Co.*, 213 U.S. 175, 191.

D. Deprivation of Constitutional Rights.

With respect to the facts involved in the three incidents out of which the criminal prosecutions arose, in every instance the District Court accepted the testimony of witnesses for respondents. Yet, taking the facts in the worst light for petitioners, the District Court found petitioners were entitled to relief. This conclusion seems inescapable since the record discloses:

As a result of the Paia incident, seventy-five men were charged with the twenty-year felony of unlawful assembly and riot as an aftermath of an incident during which no blows were struck, the police read the loitering law to the pickets, but did not order them to disperse, and no arrests were made, although twenty police officers were present. The whole incident lasted less than three minutes.

The Kalua incident involves an assault and battery on two men, yet as a result of the incident, five men were charged with unlawful assembly.

The harbor incident, which lasted less than five minutes, resulted in at most two assault and batteries and in some pineapples being thrown out of bins.

Yet, as a result of these three incidents, one hundred and twenty-seven persons are faced with the felony of unlawful assembly and riot, loss of political rights and deportation for the non-citizens.

The District Court found that exceptional circumstances existed and irreparable injury had been shown. Its conclusion was based squarely on the decisions of this Court in *American Federation of Labor v. Watson* and *Douglas v. Jeannette*. The District Court said:

> First under *A. F. of L. v. Watson* our reasons are as follows: As we have stated, the unlawful assembly and riot act and the conspiracy statute of the Territory of

Hawaii are unconstitutional upon their face and the impact of the two statutes as employed, and as about to be employed, by the law enforcement authorities of the Territory, is such as to disrupt immediately any substantial possibility or opportunity for genuine collective bargaining between the employers of the sugar and pineapple industries and their respective employees. As we have stated the growing of pineapples and the raising of sugar cane are the two major industries of the Territory. By the very existence of the two statutes referred to as well as by reason of the manner of their enforcement by the authorities of the Territory, the scales are weighted so heavily in favor of the employer and against the employee as to render fair collective bargaining a virtual impossibility under the Labor Management Relations Act, 1947, 29 U.S.C.A. Sections 157-8. That Act is applicable in the Territory of Hawaii as we have stated. The Hawaiian statutes effect indirectly the very result which the amendment to the Constitution of Florida under consideration in *A. F. of L. v. Watson* was designed to effect directly. A court of the United States has a duty to protect interstate commerce under Section 1337 of revised Title 28, U. S. Code. A court of the United States under Section 1343 of that Title also must protect civil rights as guaranteed by the Constitution and as defined by the Civil Rights Act.

* * *

All collective bargaining in the Territory of Hawaii in our opinion is substantially affected by the two statutes as well as by the prosecutions conducted or about to be carried on thereunder. Approximately thirty thousand members of the ILWU and the union itself necessarily feel the impact of the statutes as does each employer in the sugar and pineapple industries. All labor relations in the Islands are clouded by them. On the records presently before us we think it is fair to state that equable or amicable relations between employers and employees in the Territory of Hawaii are impossible while the statutes stand. The repercussions which arise from the enforcement of these statutes of the Ter-

> ritory are such as to cause great and irreparable harm and damage to all labor relations in Hawaii.

The District Court then found bad faith in the criminal prosecutions, stating:

> . . . In view of the foregoing we are brought to the conclusion that the threatened prosecutions of the plaintiffs are not "in good faith" within the purview of that requirement as laid down in *Douglas v. Jeannette,* and that the criminal proceedings complained of are being carried on for the purpose of attack upon a labor movement rather than for the ends of justice.

On the basis of the record in the instant cases, the decision of the Circuit Court of Appeals reversing the District Court emasculates the Civil Rights Act and deprives petitioners of relief to which they are entitled.

IV. THE FINDINGS OF THE DISTRICT COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE COURT OF APPEALS ERRED IN SETTING THEM ASIDE.

The Court of Appeals set aside the findings of the District Court in respect to irreparable injury and in respect to the findings of bad faith in the criminal prosecutions.

The finding of the District Court that all collective bargaining in the Territory is substantially affected by the two statutes as well as by the prosecutions conducted or about to be carried on thereunder was based on the whole record.

The breaking of one strike — the pineapple strike — by the mass arrests under these statutes and the prevention of a strike to improve conditions of members of the union engaged in the longshore industry standing alone are sufficient to justify a finding of irreparable injury.

These strikes were lawful strikes protected by federal labor laws. They were not comparable in any way to the unlawful work stoppages in *International Union v. Wis-*

consin Board, 336 U. S. 245. They affected not only the comparatively few members implicated in trivial violations of law but all of the union's 30,000 members on whose behalf the action was brought.

The finding of the District Court was that on the basis of the record before it, the criminal prosecutions were carried on by appellants for the purpose of attack upon a labor movement rather than for the ends of justice. This conclusion of fact was reached, not only on the basis of the enumeration of facts recited by the Court of Appeals in its opinion, but on the basis of the whole record.

The conclusion of bad faith seems inescapable when 75 persons are indicted for a 20-year felony as a result of an incident where police officers present read the petty misdemeanor statute prohibiting loitering, congratulated the people present on keeping order and stated that four or five might be charged with loitering to make a test of that act!

The conclusion of bad faith would seem to be justified solely on the facts surrounding the return of indictment. Seventy-five working men were indicted by a grand jury composed in direct contravention of clearly defined principles laid down by the United States Supreme Court, returned at a time when the federal court had enjoined the submission of facts to the same grand jury in Civil 828 under identical facts and circumstances, including its illegal composition.

Taking the record as a whole the District Court's finding of exceptional circumstances is supported by substantial evidence and is not "clearly erroneous."

Under Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., the United States Court of Appeals cannot set aside the trial court's findings of fact unless the findings are so lacking in evidentiary support as to be clearly erroneous. This principle was recently stated by the United

States Court of Appeals for the Eighth Circuit in *U. S. Cartridge Co. v. Powell,* 185 F. (2d) 67, as follows:

> From all of the evidence on the subject, it is not unlikely that we, sitting as a trial court, might have reached a different conclusion than the trial court reached on the propriety of the classification of these plaintiffs, but as we have repeatedly pointed out above and repeatedly held in reported cases, by the express direction of the Rules of Civil Procedure, 28 U.S.C.A., we may not set aside a finding of fact of a trial court unless that finding is so lacking in evidentiary support as to be clearly erroneous. In this instance we find sufficient conflicting inferences which may be drawn from the evidence to preclude us from holding that the trial court's finding was clearly erroneous.

See also *Imperial Assurance Co. v. Supornick,* 184 F. (2d) 930; *Fanish v. Fanish,* 195 F. (2d) 425.

This well established rule of judicial proceeding was not given effect to by the Circuit Court of Appeals.

This Court has held that whether the equitable jurisdiction to grant injunctions should be exercised is a matter resting within the sound discretion of the trial court, and that the exercise of that discretion should not be disturbed on appeal unless the discretion has been abused. This case would seem to present even stronger reasons to refuse to interfere with the exercise of the judicial discretion by the District Court than appeared in *Public Utilities Com. v. United Fuel Gas Co.,* 317 U. S. 456. There this Court, in refusing to interfere with a three-judge court's decision granting an injunction, said at page 469:

> It is perhaps unnecessary at this late date to repeat the admonition that the federal courts should be wary of interrupting the proceedings of state administrative tribunals by use of the extraordinary writ of injunction. But this, too, is a rule of equity and not to be ap-

> plied in blind disregard of fact. And what are the commanding circumstances of the present case? First, and most important, the orders of the state Commission are on their face plainly invalid. No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act. . . . In these circumstances, we cannot set aside the decree of the District Court as an improper exercise of its equitable jurisdiction.

Here the two statutes declared invalid are clearly, as the District Court found, void on their face. The method pursued in the selection of the grand jury meets the standard of proof well defined by decisions of the United States Supreme Court.

Past deprivation of rights, and threatened continued deprivation of rights have been clearly shown. The grave irreparable injury to appellees has been established by the evidence and found by the District Court.

This case is many-faceted, legally and factually. Even if one or more of the facts found by the District Court were erroneous, that would not be sufficient to warrant the reversal of the District Court by the Court of Appeals.

Three federal judges who heard the facts unanimously concluded that petitioners were entitled to relief if justice were to be done in accordance with the requirements of the Constitution and laws of the United States. The Court of Appeals in summarily setting aside findings of fact of the District Court and interfering with the decision of the District Court when no abuse was shown departed from the accepted and usual course of federal procedure and its decision should be reversed.

The judgment of the Court of Appeals should be reversed

and the degree and judgments of the District Court in both cases should be affirmed.

Dated at Honolulu, T. H., this 8th day of August, 1951.

Respectfully submitted,

BOUSLOG & SYMONDS
HARRIET BOUSLOG

By .....
Harriet Bouslog
Attorneys for Petitioners.

APPENDIX I

CHAPTER 277. RIOTS AND UNLAWFUL ASSEMBLIES.

Sec. 11570. Unlawful assembly defined. Where three or more persons are, of their own authority, assembled together with disturbance, tumult and violence, and striking terror or tending to strike terror into others, such meeting is an unlawful assembly within the meaning of the provisions of this chapter. [P. C. 1869, c. 38, s. 1; R. L. 1925, s. 4342; R. L. 1935, s. 6170.]

Sec. 11571. Riot defined. A riot is where three or more being in unlawful assembly join in doing or actually beginning to do an act, with tumult and violence, and striking terror, or tending to strike terror into others. [P. C. 1869, c. 38, s. 2; R. L. 1925, s. 4343; R. L. 1935, s. 6171.]

Sec. 11572. Menacing demonstrations. Menacing language, or gestures, or show of weapons or other signs or demonstrations tending to excite terror in others, are sufficient violence to characterize an unlawful assembly or riot. [P. C. 1869, c. 38, s. 3; R. L. 1925, s. 1433; R. L. 1935, s. 6172.]

Sec. 11573. Concurrence in intent. Concurrence in an intent of tumult and violence, and in any violent tumultuous act, tending to strike terror into others, is a sufficient joining in intent to constitute a riot, though the parties concerned did not previously concur in intending the act. For example, where persons present at a public performance concur in the intent to disturb the same by tumult and violence, tending to strike terror; or concur in one or more acts of tumult or violence tending to strike terror, done by any of the assembly. [P. C. 1869, c. 38, s. 4; R. L. 1925, s. 4345; R. L. 1935, s. 6173.]

Sec. 11574. Tumult and violence though assembled lawfully. It is not requisite in order to constitute an unlawful assembly or riot, that persons should have come together with a common or unlawful intent, or in any unlawful manner; or that the object of the meeting, or the act done or intended, should of itself be unlawful. The tumult and violence tending to excite terror, characterize the offense, though the persons may have assembled in a lawful manner, and though the object of the meeting, if legally pursued, or the act done or intended, if performed in a proper manner, would be lawful. [P. C. 1869, c. 38, s. 5; R. L. 1925, s. 4346; R. L. 1935, s. 6174.]

Sec. 11575. Promoting or aiding. Persons present at a riot or unlawful assembly, and promoting the same, or aiding, abetting, encouraging or countenancing the parties concerned therein by words, signs, acts or otherwise, are themselves parties thereto and principles therein. [P. C. 1869, c. 38, s. 6; R. L. 1925, s. 4347; R. L. 1935, s. 6175.]

Sec. 11576. Remaining after order to disperse. In case of an unlawful assembly being by proclamation or otherwise ordered to disperse by any one having legal authority to disperse the same, any one voluntarily remaining in the assembly after notice of the order, except for keeping the peace, is thereby a party concerned in the unlawful assembly. [P. C. 1869, c. 38, s. 7; R. L. 1925, s. 4348; R. L. 1935, s. 6176.]

Sec. 11577. Notice of order presumed. Every person present in an unlawful assembly is presumed to have notice of an order given by lawful authority in lawful manner for the same to disperse. [P. C. 1869, c. 38, s. 8; R. L. 1925, s. 4349; R. L. 1935, s. 6177.]

Sec. 11578. Penalty where object is injury of house, etc. Whoever is guilty of a riot or unlawful assembly, having for its object the destruction or injury of any house, building, bridge, wharf, or other erection or structure; or the destruc-

tion or injury of any ship or vessel, or the furniture, apparel or cargo thereof, shall be punished by imprisonment at hard labor not more than two years, or by fine not exceeding five hundred dollars; and shall also be answerable to any person injured to the full amount of his damage. [P. C. 1869, c. 38, s. 9; R. L. 1925, s. 4350; R. L. 1935, s. 6172.]

Sec. 11579. Penalty where persons are endangered. Whoever is guilty of being a party concerned in a riot or unlawful assembly endangering the life, limb, health or liberty of any person, or in any other riot or unlawful assembly, not of the description designated in section 11572, shall be punished by a fine not exceeding one thousand dollars or by imprisonment at hard labor for not more than twenty years. [P. C. 1869, c. 38, s. 10; R. L. 1925, s. 4351; am. L. 1929, c. 4, s. 1; R. L. 1935, s. 6179.]

Sec. 11580. Riot, unlawful assembly. If upon the trial of any person for being concerned in a riot or unlawful assembly as described in section 11579, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offense mentioned in section 11578, then the jury may return as their verdict that he is not guilty of the offense charged, but is guilty of such offense, and he may be punished accordingly. [L. 1876, c. 40, s. 59; R. L. 1925, s. 4090; R. L. 1935, s. 6180.]

Sec. 11581. By officers. In case of any riot or unlawful assembly in any town, village or district, it shall be the duty of every district magistrate there resident, and also of the high sheriff, sheriff, and his deputies, and of the chief of police for the town, village or district to go among the persons so assembled, or as near to them as may be with safety, and in the name of the Territory to command all the persons so assembled immediately and peaceably to disperse; and if the persons shall not thereupon so disperse, it shall be the duty of each of the officers to command the assistance of all per-

sons present, in seizing, arresting and securing in custody the persons so unlawfully assembled, so that they may be proceeded with for their offense according to law. [P. C. 1869, c. 38, s. 11; R. L. 1925, s. 4352; R. L. 1935, s. 618.]

Sec. 11582. Posse comitatus. If any persons riotously or unlawfully assembled, who have been commanded to disperse by the high sheriff, sheriff, deputy sheriff, chief of police, or district magistrate, shall refuse or neglect to disperse without unnecessary delay, any two of the officers may require the aid of a sufficient number of persons in arms, or otherwise, as may be necessary, and shall proceed in such manner as in their judgment shall be expedient forthwith to disperse and suppress the unlawful, riotous, or tumultuous assembly, and seize and secure the persons composing the same, so that they may be proceeded with according to law. [P. C. 1869, c. 38, s. 12; R. L. 1925, s. 4353; R. L. 1935, s. 6182.]

Sec. 11583. Orders to. Whenever an armed force shall be called out for the purpose of suppressing any tumult or riot or unlawful assembly, or to disperse any body of riotous men, the armed force shall obey such orders for suppressing the riot or tumult or for dispersing and arresting the persons who are committing any of the said offenses, as they may receive from the high sheriff, sheriff, or chief of police, and also such further orders as they may receive after they shall arrive at the place of the unlawful, riotous or tumultuous assembly, as may be given by any two of the magistrates or officers mentioned in the preceding section. [P. C. 1869, c. 38, s. 13; R. L. 1925, s. 4354; R. L. 1935, s. 6183.]

Sec. 11584. Persons killed or wounded. If by reason of the efforts made by any two or more such magistrates or officers, or by their direction, to disperse the unlawful, riotous or tumultuous assembly, or to seize and secure the persons composing the same, who have refused to disperse,

any such person or any other person then present, as spectators or otherwise, shall be killed or wounded, the magistrates and officers and all persons acting by their order or under their direction shall be held guiltless and justified by law, and if any of the magistrates or officers, or any person acting under their authority or by their direction shall be killed or wounded, all the persons so at the time unlawfully, riotously or tumultuously assembled, and all other persons who, when commanded or required, shall have refused to aid and assist the magistrates or officers, shall be held answerable therefor. [P. C. 1869, c. 38, s. 14; R. L. 1925, s. 4355; R. L. 1935, s. 6184.]

Revised Laws of Hawaii, 1945.

APPENDIX II

CHAPTER 243. CONSPIRACY.

Sec. 11120. Defined; examples. A conspiracy is a malicious or fraudulent combination or mutual undertaking or concerting together of two or more, to commit any offense or instigate any one thereto, or charge any one therewith; or to do what plainly and directly tends to excite or occasion offense, or what is obviously and directly wrongfully injurious to another:

For instance—A confederacy to commit murder, robbery, theft, burglary or any other offense prohibited by law; to prevent, obstruct, defeat or pervert the course of justice, by suborning a witness, tampering with jurors, or the like offenses; to groundlessly accuse any one of, and cause him to be prosecuted for, an offense; to charge any one with an offense, with the intent and for the purpose of extorting money from him; to falsely charge one with being the father of an illegitimate child; to cheat another by means of false tokens and pretenses; to manufacture a spurious article for the purpose of defrauding whomsoever the same can be sold to; to destroy a will and thereby prejudice the devisees; to prevent another, by indirect and sinister means, from exercising his trade, and to impoverish him; to establish, manage or conduct a trust or monopoly in the purchase or sale of any commodity. [P. C. 1869, c. 28, s. 1; am. L. 1892, c. 102, s. 1; R. L. 1925, s. 4331; R. L. 1935, s. 5720.]

Sec. 11121. Joining in after formation. Any person knowingly acceding to and joining in a conspiracy after the same is formed, is a party thereto, no less than the one who originally takes part in forming the same. [P. C. 1869, c. 28, s. 2; R. L. 1925, s. 4332; R. L. 1935, s. 5721.]

Sec. 11122. Act in pursuance of, unnecessary. It is not requisite that the act agreed upon should be done or at-

tempted in pursuance of the conspiracy; the conspiracy itself constitutes the offense. [P. C. 1869, c. 28, s. 3; R. L. 1925, s. 4333; R. L. 1935, s. 5722.]

Sec. 11123. Act of any is that of all. The act of each party to a conspiracy, in pursuance thereof, is the act of all. [P. C. 1869, c. 28, s. 4; R. L. 1925, s. 4334; R. L. 1935, s. 5723.]

Sec. 11124. Husband and wife. Husband and wife cannot by themselves, without others, be guilty of a conspiracy, and the acts or confessions of either are not evidence against the other in a prosecution for conspiracy. [P. C. 1869, c. 28, s. 5; R. L. 1925, s. 4335; R. L. 1935, s. 5724.]

PROCEDURE

Sec. 11125. Trial joint or several. Conspirators may be tried jointly or severally. But to prevent oppression by joining parties, and thus depriving some of the testimony of others, it is provided that in the trial of any one for a conspiracy, another, charged as a co-conspirator, may be a witness, and in such case the two may be separately tried, though joined in the indictment. [P. C. 1869, c. 28, s. 6; R. L. 1925, S. 4336; R. L. 1935, s. 5725.]

Sec. 11126. Conspiracy and offense both not punishable. Where one is convicted of any offense, he is not liable thereafter to be tried for or convicted of a conspiracy to commit the same; and if a conspiracy to commit an offense and the commission of the same be charged in the same indictment, the defendant is liable to be sentenced for one only. [P. C. 1869, c. 28, s. 7; R. L. 1925, s. 4337; R. L. 1935, s. 5726.]

Sec. 11127. Trivial offense. On a prosecution for conspiracy, if the jury find, or the magistrate having jurisdiction of the fact consider, the offense to be trivial, the defendants shall be discharged, with or without costs, in the discretion of the court. [P. C. 1869, c. 28, s. 8; R. L. 1925, s. 4338; R. L. 1935, s. 5727.]

DEGREES, PENALTIES

Sec. 11128. First degree. Conspiracy to commit, or to instigate to the commission of a felony; or to charge any one with felony; or to prevent, obstruct, defeat, or pervert the course of justice; or to forge or counterfeit or cheat to an amount exceeding one hundred dollars, is in the first degree, and shall be punished by imprisonment at hard labor not more than ten years, or by fine not exceeding ten thousand dollars. [P. C. 1869, c. 28, s. 9; R. L. 1925, s. 4339; R. L. 1935, s. 5728; am. L. 1935, c. 99, s. 1]

Sec. 11129. Second degree. A conspiracy to establish, create, manage or conduct a trust or monopoly in the purchase or sale of any commodity is in the second degree, and shall be punished by imprisonment at hard labor not more than two years, or by fine not exceeding one thousand dollars. [P. C. 1869, c. 28, s. 10; am. L. 1892, c. 102, s. 2; R. L. 1925, s. 4340; R. L. 1935, s. 5729; am. L. 1935, c. 99, s. 2.]

Sec. 11130. Third degree. Conspiracy not appearing to be in the first or second degree, is in the third degree, and shall be punished by imprisonment of not exceeding one year and by fine not exceeding four hundred dollars. [L. 1892, c. 102, s. 3; R. L. 1925, s. 4341; R. L. 1935, s. 5730.]

APPENDIX III

1. RACIAL COMPOSITION OF JURY BASED ON CENSUS CLASSIFICATION.

The proof adduced by petitioners that from the standpoint of race, the 1947 grand jury is not a cross-section of the population of Maui County, and therefore violates clearly enumerated principles laid down by this Court, is summarized in tabular form in a chart submitted to the court during oral orgument. This summary is based upon the United States census classification of race. It shows:

Percentage Comparison, Race of Population of Maui County[1] and of Grand Jury List, 1947, Maui County

NATIONALITY		Percentage of Population of Maui County	Percentage of 1947 Grand Jury Panel
Japanese	24,183	43.2%	14%
Filipino	10,509	18.8%	0%
Part Hawaiian	7,915	14.1%	24%
Caucasian	6,989	12.5%	54%
Hawaiian	2,946	5.3%	0%
Chinese	1,513	2.7%	8%
Other Races (Korean, Puerto Rican)	1,925	3.4%	0%

The record shows that the petitioners offered to prove before Judge Cristy, but were not permitted to prove, that if selected at random from qualified persons in order to secure a cross-section, a grand jury of this racial composition would not occur in Maui County more than once in ten million times.

---

[1] Census classification of Race of Population of Maui County. 1940 Population—55,980. Dept. of Health, Bureau of Health (Vital) Statistics, T. H., show little change in racial characteristics, 1940 to 1946. Population, estimated as of July 1, 1946—55,904.

2. COMPOSITION OF 1947 MAUI GRAND JURY BASED ON ACCEPTED ISLAND CLASSIFICATIONS.

Percentage Comparison of "Nationality" of Population of Maui County, 1940, and of Persons on the 1947 Grand Jury Panel, Maui County[2] "Nationalities" Roughly Ranked as to Socio-Economic Status

NATIONALITY	Percentage of Population	Percentage on Grand Jury
Haole	3.6%	42.0%
Portuguese	8.8%	12.0%
Caucasian-Hawaiian	7.4%	20.0%
Other Part-Hawaiian	6.8%	4.0%
Chinese	2.7%	8.0%
Japanese	43.2%	14.0%
Korean	1.4%	0
Hawaiian	5.3%	0
Puerto Rican	1.9%	0
Filipino	18.8%	0

[2] Number of Haoles ("Other Caucasians"), Portuguese (including Spaniards), Caucasian-Hawaiians and other Part-Hawaiians, Koreans and Puerto Ricans obtained by carrying forward the 1930 proportions of these categories.

3. ANALYSIS OF GRAND JURY BASED ON UNITED STATES CENSUS CLASSIFICATION OF OCCUPATIONS.

Percentage Comparison, Socio-Economic Classes, Gainfully Employed Persons of Maui County, 1940, and Grand Jury List, Maui County, 1947[a]

SOCIO-ECONOMIC CLASSES	Percentage of Population	Percentage of Panel
Proprietors and Managers (Important firms and/or large branches)	0.6%	24.0%
Other Proprietors, Managers, officials and foremen	4.9%	40.0%
Professional and Semi-professional	3.2%	8.0%
Farm Foremen	2.5%	0
Farmers	2.5%	4.0%
Clerical, sales, etc.	6.4%	12.0%
Craftsmen and Operatives	18.1%	6.0%
Laborers, Non-Farm	9.9%	2.0%
Farm Laborers	47.1%	0
Service Workers	4.7%	0
Occupation Not Specified	0.3%	4.0%

[a] Adapted from Table 3, with certain classes combined and/or divided; Grand Jury data corrected.

4. COMPARISON OF THE OCCUPATIONAL CLASSIFICATION OF THE BLUE-RIBBON JURY IN THE FAY CASE WITH THE 1947 MAUI COUNTY JURY.

	Percentage of total experienced labor forces		Percentage of representation	
	Manhattan	Maui County	"blue ribbon" panel	Maui County
Professional and semi-professional	12.1	3.2	18.8	8
Proprietors, managers and officials	9.3	5.6	43	64
Clerical, sales and kindred workers	21.3	6.4	38	12
Craftsmen, foremen and kindred workers	7.7	20.16	0.2	6
Operatives and kindred workers	17		0	
Service workers	27.6	4.7	0	0
Laborers	4.9	57	0	2
Farmers	0.1	2.5	0	4
Not specified		.3		4

In the blue-ribbon jury, 99.8% were picked from groups representing 42.7% of Manhattan's population. In Maui County Grand Jury, 84% of the jury were picked from groups representing 15% of the population.

Even in the majority opinion in the *Fay* case, the court recognized that the exclusion of workers in a case growing out of a labor dispute might present a different problem. Here unlike in the *Fay* case, the petitioners are farm laborers who are excluded totally from the jury.

Office-Supreme Court, U.S.
FILED
OCT 8 1951
CHARLES ELMORE CROPLEY
CLERK

No. 245

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary Unincorporated Association and Labor Union, et al.,
Petitioners,

vs.

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WALTER D. ACKERMAN, JR.,
Attorney General, Territory of Hawaii,

J. GARNER ANTHONY,
Special Deputy Attorney General,

RHODA V. LEWIS,
Deputy Attorney General,

RICHARD K. SHARPLESS,
Deputy Attorney General,
Counsel for Respondents Ackerman and Lane.

Subject Index

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT	2- 8
(1) Petitioners' Statement does not conform to this Court's requirements and should be disregarded	2- 4
(2) Statement of the case	4- 8
ARGUMENT	8-20
1. The Decision Below is Not in Conflict with the Third or Sixth Circuits, and it Properly Applies the Decisions of this Court	8-16
A. The substance of the petition	8- 9
B. The third and sixth circuit decisions cited by petitioner present no basis for certiorari	9-12
C. The court below properly applied the decisions of this Court	12-16
2. The Reversal by the Court Below of the District Court's Finding of Lack of Good Faith was Correct	16-17
3. The District Court Erred in Invalidating the Criminal Statutes and the Grand Jury	17-20
A. The District Court erred in invalidating the unlawful assembly and riot act	17-18
B. The District Court erred in invalidating the conspiracy statute	18-19
C. The District Court erred in invalidating the 1947 grand jury	19-20
CONCLUSION	21

Table of Authorities

Cases

Page

A.F.L. v. Watson, 327 U.S. 582 ..... 7, 12, 14, 15, 18
Alesna v. Rice, 172 F. 2d 176 (C.A. 9th 1949) cert. denied 338 U.S. 814 ..... 8, 15, 16
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) .. 15
Babcock v. Noh, 99 F. 2d 738 (C.A. 9th 1938) 8, 10, 15
Broad-Grace Arcade Corp. v. Bright, 284 U.S. 588, aff'g 48 F. 2d 348 16
Cantwell v. Connecticut, 310 U.S. 296 18
Carter v. Texas, 177 U.S. 442 19
Chaplinsky v. New Hampshire, 315 U.S. 568 18
Cline v. Frink Dairy Co., 274 U.S. 445 (1927) 8, 16
Cole v. Arkansas, 338 U.S. 345 18
Connally v. General Construction Co., 269 U.S. 385 (1926) 18
Cooper v. Hutchinson, 184 F. 2d 119 (C.A. 3d 1950) 11, 12
Darr v. Burford, 339 U.S. 200 (1950) 11
Douglas v. Jeannette, 319 U.S. 157 (1943) 7, 8, 12, 13, 15
Duncan v. Kahanamoku, 327 U.S. 304 (1946) 10
Feiner v. New York, 340 U.S. 315 18
Fenner v. Boykin, 271 U.S. 240 (1926) 16
Giles v. Harris, 189 U.S. 475 (1903) 8
Hague v. C.I.O., 307 U.S. 496 (1939) 12, 13, 15
Hawk, Ex parte, 321 U.S. 114 13
Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) 15
Kaizo v. Henry, 211 U.S. 146 (1908) 19
Kentucky v. Powers, 201 U.S. 1 13
McShane v. Moldovan, 172 F. 2d 1016 12
Mooney v. Holohan, 294 U.S. 103 13
Moore v. New York, 333 U.S. 565 (1948) 20
Musser v. Utah, 333 U.S. 95 (1948) 18
Nash v. United States, 229 U.S. 373 18
National Maritime Union v. Herzog, 78 F. Supp. 146, aff'd 334 U.S. 854 (1948) 15
Reid v. Brookville, 39 F. Supp. 30 13
Screws v. United States, 325 U.S. 91 (1945) 12, 14
Shipman v. DuPre, 339 U.S. 321 (1950) 18
Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949) 2, 8, 16, 18

Table of Authorities

Cases—Continued

	Page
Stefanelli v. Minard, 184 F. 2d 575 (C.A. 3d 1950) cert. granted May 14, 1951, No. 2 October 1951 Term	9, 10, 11
Stromberg v. California, 283 U.S. 359	19
Territory v. Braly, 29 Haw. 7	19
Territory v. Kaholokula, 37 Haw. 625 (1947)	10, 17
Territory v. Kataoka, 28 Haw. 173, 176	10
Territory v. Tam, 36 Haw. 32	19
Territory v. Yoshimura, 35 Haw. 324, 330	10
Thiel v. Southern Pacific Co., 338 U.S. 217	20
United States v. Classic, 313 U.S. 299 (1941)	12, 14
United States v. Warden, 187 F. 2d 615 (C.A. 3d 1951)	11
United Public Workers v. Mitchell, 330 U.S. 75 (1947)	15
Watson v. Buck, 313 U.S. 387 (1941)	15
Wilder's S.S. Co. v. Hind, 108 Fed. 113, aff'd 183 U.S. 545	16
Williams v. Miller, 317 U.S. 599 (1942), aff'g per curiam 48 F. Supp. 277	8
Winters v. New York, 333 U.S. 507 (1948)	18
Wolf v. Colorado, 338 U.S. 25 (1949)	9, 10, 11
Yeung v. Territory of Hawaii, 132 F. 2d 374	16
Young, Ex parte, 209 U.S. 123 (1908)	8, 16

Statutes

Revised Laws of Hawaii 1945:	
Chapter 243	6, 18
Chapter 277	3, 6, 17
Sec. 11103	3
8 U.S.C. 43	8
28 U.S.C. 1254 (1)	2
28 U.S.C. 2283	12

No. 245

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary Unincorporated Association and Labor Union, et al.,
Petitioners,

vs.

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 2004-2025) is reported in 187 F. 2d 860. The opinion of the United States District Court for the District of Hawaii (R. 366-520) is reported in 82 F. Supp. 65.

JURISDICTION

This petition involves two cases[1] in which judgments were entered by the Court of Appeals[2] on February 28, 1951 (R. 2025-2026, 2027-2028). Rehearing was denied on May 25, 1951 (R. 2028). Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The District Court enjoined four pending territorial criminal proceedings upon the ground that it found invalid the criminal statutes involved and the manner of selecting the grand jury. The Court of Appeals reversed the decrees and directed the dismissal of the suits. The question presented is:

> Did the Court of Appeals err in holding that the injunctions must be denied because of two basic circumstances i.e. that only pending territorial criminal proceedings are involved and the defendants therein have full opportunity to test the criminal statutes and the grand jury's composition in those criminal proceedings and upon appeal therefrom.

This question is argued in Point 1, infra. Further questions, which respondents believe will not be reached, are presented and argued briefly in Points 2 and 3.

STATEMENT

(1) Petitioners' Statement does not conform to this Court's requirements and should be disregarded.

---

[1] The two cases were consolidated (R. 348, 565, 1135). Unless otherwise indicated, references to the record are to the record in No. 12,300 in the Court of Appeals, or to the consolidated record in Nos. 12,300-12,301, the paging of which follows consecutively the paging in volume I of the record in No. 12,300. Where the reference is to volume I of the record in No. 12,301 (a volume of 101 pages which for that case precedes the consolidated record) the reference used is as follows: "No. 12,301, R. ....."

[2] The District Court had erroneously convened a three judge court (R. 100-103; No. 12,301, R. 49-52); in this circumstance an appeal lay to the Court of Appeals, rather than to this Court. *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368, 380-381 (1949).

In their Summary Statement of Matter Involved (Pet. 2-17) petitioners violate the rules of this Court[3] to such an extent that their Statement should be disregarded. Petitioners reject and restate portions of the trial court's findings that the court below accepted.[4] As to other findings, petitioners (without references to the record) commingle the facts found with their own additions. That the additions were not found by either court can be perceived only through a page by page comparison.[5] In both situations "appropriate page references to the printed record" are missing, and there are instances where nothing in the record could be cited.[6] In both situations petitioners fail to show, either here or elsewhere in their brief, wherein there are open to them the factual questions which they seek to inject by these restatements and additions. Since petitioners were appellees below and did not cross-appeal,

---

[3] Rule 27, paragraphs 2(d) and 3.

[4] There is a complete restatement of the findings as to the three incidents which occasioned the four pending territorial criminal proceedings (Pet. 8-12). These findings were the same in the trial court and the court below (R. 2006-2009).

[5] For example:

Pet. 6, lines 9-10, states petitioners showed they were singled out "for harsher treatment than other persons in the community for like offenses." Like offenses of other persons is the matter that the Court of Appeals held was missing from one of the trial court's findings and essential to give that finding significance (R. 2017). Petitioners do not cite the record. As the Court of Appeals held (R. 2017), the record contains no proof of like offenses of other persons.

Pet. 7, line 29 to Pet. 8, line 2, concerns an incident on Oahu, in the City and County of Honolulu, having a different prosecutor than the County of Maui where the incidents here involved occurred. Despite respondents' objections (R. 1218-1220, 1566-1567) to the admissibility of evidence of this Oahu incident the District Court admitted it (R. 409, note 45), but did not find the persons involved were held "purportedly for violations of the unlawful assembly and riot act," which petitioners now assert they showed; the District Court found only that the charges were "obstructing a highway" (R. 409). The unlawful assembly and riot act, which the petitioners inject by their statement, is the statute involved in these cases. The offense of obstructing the highway (Sec. 11103, Revised Laws of Hawaii 1945) is not involved.

[6] See Note 5, supra.

obviously the factual questions are limited, and even if these restatements and additions were properly supported by record citations, the materiality thereof would have to be shown for this Court to consider them.

(2) Statement of the case.

These are suits brought by defendants in four criminal proceedings pending in the Circuit Court of the Territory of Hawaii, to enjoin their prosecution. Additional parties were the International Longshoremen's and Warehousemen's Union (ILWU) and members of the union alleging class representation. (R. 3-4, 9-10, 104-105; No. 12,301, R. 4-5, 12-13.) Plaintiffs are petitioners here. The respondents here are the Attorney General of Hawaii, in both cases, and the Chief of Police of the County of Maui, in one of the cases.

The four territorial criminal proceedings are docketed in the Circuit Court of the Second Circuit, County of Maui, as Criminal No. 2365 (No. 12,301, R. 28-34), Criminal No. 2412 (R. 88-93), Criminal No. 2413 (R. 93-99), and Criminal No. 2419 (R. 138-323). These four proceedings grew out of three incidents occurring in said county. The facts as to the three incidents were found by the District Court,[7] and such findings were accepted by the Court of Appeals and incorporated in its opinion as follows:

> "The criminal charges grew out of certain disorders which occurred during separate strikes by sugar-workers, and pineapple workers, members of the ILWU union." (R. 2006.)

The 1946 Paia incident, involved in Criminal No. 2365 and Cause No. 12,301.

"On the morning of October 16, 1946, during the

[7] R. 391-395 as to the 1946 Paia incident; R. 402-406 as to the first 1947 Lanai incident; R. 408 as to the second 1947 Lanai incident.

sugarworkers strike, some three to four hundred members of that group were in a picket line, four columns deep, before the entrance to the sugar mill of Maui Agricultural Company at Paia, on the Island of Maui. Five workmen employed in the mill appeared for the purpose of crossing the picket line and going to work. The same men had attempted to pass through to work the previous day, but had been prevented because the pickets stood shoulder to shoulder. On the 16th a number of police were on hand.[1] [Note 1: "The opinion of the district court states that at this time 'After certain preliminary conversations between members of the ILWU, Kealoha, Joseph Kaholokula, and others respecting the entry of the five workmen to the mill it was stated by Kaholokula that if the five men tried to cross the picket line, "police or no police," there would be violence and bloodshed.' (82 F. Supp. 65, 79.) "] As the mill whistle blew the five men, escorted by the police, started toward the mill entrance. Two hundred of the pickets converged on the five men and pushed them back. Upon a second attempt to pass the five workmen and the police were pushed back 10 or 12 feet farther. This ended the attempts to enter the mill. There is no finding that any blows were struck." (R. 2006-2007.)

The two 1947 Lanai incidents, involved in Criminal Nos. 2412, 2413, and 2419 and Cause No. 12,300.

"The other three criminal proceedings grew out of incidents later occurring in connection with the pineapple workers strike, on the Island of Lanai, also in the County of Maui. On July 14, 1947, as several supervisory employees of the Hawaiian Pineapple Company, not members of the union, were about to load upon a barge some pineapples picked before the strike and then in bins upon the wharf, about 300 union pickets led by union 'picket policemen' ran toward the men on the wharf, yelling 'at the tops of their voices,' caught and beat one of the men, chased and 'punched at' another, forcing him and another man to jump into the water to escape, broke open the bins and

threw pineapples at the barge and tug and at the men in the water." (R. 2008.)

"On the day following the incident at the wharf, 20 to 25 persons headed by 'union police' with arm bands, went to the rooms of two non-striking truck drivers employed by the Hawaiian Pineapple Company on the Island of Lanai, and administered 'a severe beating' to both of them." (R. 2008.)

Three of the criminal proceedings involve the offense of riot, and the other, Criminal No. 2365, riot and conspiracy. (R. 88-93, 93-99, 138-323; No. 12,301, R. 28-34; R. 2006.) In both federal suits petitioners attacked the statute setting forth the offense of riot, and in the suit involving Criminal No. 2365 the conspiracy statute as well.[8] They also attacked the manner in which the grand jury was selected.[9]

The District Court held invalid the criminal statutes (R. 439-467) and the composition of the grand jury list (R. 486-512). It justified equitable relief by what it thought was "exceptional circumstances" (R. 467-486). By its decree in No. 12,300 the District Court enjoined three of the pending territorial criminal proceedings,[10] and by its decree in No. 12,301 enjoined the other pending proceeding.[11] The decrees contained no other injunctive relief.

---

[8] R. 11-14; No. 12,301, R. 13-15. The statutes are printed in the appendix of petitioners' brief, pp. 53-60.

[9] The attack on the grand jury is reviewed in the argument, infra, pp. 19-20.

[10] Criminal Nos. 2412, 2413, and 2419. No. 12,300 was the suit filed in the District Court on December 1, 1947 as Civil No. 828 (R. 2-26). In the decree in that case the criminal proceedings appear as "the prosecution commenced July 15, 1947" (R. 549), "the prosecution commenced July 16, 1947" (R. 548), and "the prosecution commenced August 1, 1947" (R. 549).

[11] Criminal No. 2365. No. 12,301 was the suit filed in the District Court on December 31, 1947 as Civil No. 836 (No. 12 301, R. 2-35). In the decree in that case the criminal proceeding appears as "the prosecution commenced in October, 1946" (No. 12,301, R. 95).

The Court of Appeals did not reach any issue as to the validity of the criminal statutes or the composition of the grand jury. The court held there were no "exceptional circumstances" (R. 2010-2018). As to the portion of the District Court's opinion[12] in which it held that the statutes were a cloud on labor relations and that this constituted an "exceptional circumstance" under *A.F.L. v. Watson*,[13] the court said:

> "We are unable to perceive any resemblance between the facts here and those in A.F.L. v. Watson, supra• • • •
>
> Here there is no showing of any attempted collective bargaining, or other legitimate union activity with which any act here charged to the defendants could possibly interfere• • • •" (R. 2012.)

As to the portion of the trial court's opinion[14] in which it found bad motives of the prosecutor, characterized such motives as want of good faith, and held that this constituted an "exceptional circumstance" under *Douglas v. Jeannette*,[15] the court below held that, to be relevant, lack of good faith should be such as to affect the opportunity of the applicants for injunction to test their rights in criminal cases, that a defendant in a criminal case could not, by alleging that the prosecutor's motives were bad and the criminal statute invalid, move into a court of equity and have those issues tried there. (R. 2014-2016.) The court further held "want of good faith was not proven, and the court's finding in that respect clearly erroneous" (R. 2017).

The Court of Appeals found the cases controlled by the basic circumstances that only pending criminal proceedings are involved (R. 2019-2021), and that petitioners have full opportunity to test the constitutional issues in the four

[12] R. 439, 474-479, reviewed by the court below at R. 2011-2014.
[13] 327 U.S. 582.
[14] R. 480-482, reviewed by the court below at R. 2014-2018.
[15] 319 U.S. 157.

pending criminal proceedings and upon appeal therefrom. (R. 2021-2022.) It noted that respondents had moved to dismiss the complaints for lack of showing of an appropriate case for equitable relief (R. 2020). It held that the rules expressed in its own decisions[16] and the decisions of this Court[17] "required the district court to deny the injunctions prayed for" (R. 2018-2025). The court directed entry of judgment of dismissal in each case. (R. 2003, 2025-2026, 2027-2028.)

ARGUMENT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH THE THIRD OR SIXTH CIRCUITS, AND IT PROPERLY APPLIES THE DECISIONS OF THIS COURT.

A. The substance of the petition.

The petition seeks to present, through federal equity suits, constitutional issues presentable in and upon appeal from the pending territorial criminal proceedings. This is said to be the effect of 8 U.S.C. 43 (Br. 24-26). But this Court always has, notwithstanding the citation by a pleader of this section, determined whether the subject matter of the particular suit was appropriate for equitable relief.[18] Fundamental to the showing of an appropriate case for federal equitable relief is the production of adequate reasons why the plaintiff should not defend in state criminal proceedings. This rule, in all its aspects here involved, was fully considered and properly applied by the court below.

---

[16] *Babcock v. Noh*, 99 F. 2d 738, 739 (C.A. 9th 1938) (R. 2018-2019, 2021, 2025); *Alesna v. Rice*, 172 F. 2d 176, 177 (C.A. 9th 1949) cert. denied 338 U.S. 814 (R. 2021, 2023, 2025).

[17] *Ex parte Young*, 209 U.S. 123, 162 (1908) (R. 2020); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 452-453 (1927) (R. 2021).

[18] *Giles v. Harris*, 189 U.S. 475, 486 (1903); *Williams v. Miller*, 317 U.S. 599 (1942), aff'g per curiam 48 F. Supp. 277; *Douglas v. Jeannette*, 319 U.S. 157, 162 (1943); *Stainback v. Mo Hock Ke Lok Po, supra*, 336 U.S. 368 (1949).

By reducing the opinion of the Court of Appeals to two quotations of one sentence each lifted out of context (Pet. 16-17), petitioners attempt to create the appearance of a case for certiorari. In the context the court held that no case for the exercise of equity jurisdiction was presented when, first, "there is no proof or finding that for exercising lawful rights plaintiffs are threatened with future prosecutions under the statutes they assail," and when, second, "in the four pending actions, the plaintiffs have at hand full opportunity to test their rights by defending in those proceedings." It was of this class of cases, defined and circumscribed by the court by the listing of these two "basic" circumstances, that the Court of Appeals said "No extraordinary circumstances will serve to create such [equity] jurisdiction." (R. 2021-2022.) And it was of the theory that a defendant in a criminal case can move into a court of equity for his attack on the criminal statute if he also attacks the prosecutor's motives that the Court of Appeals said "No case has been called to our attention which has applied the trial court's theory* * * *" (R. 2014-2015.)

B. The third and sixth circuit decisions cited by petitioner present no basis for certiorari.

The granting of certiorari in *Stefanelli v. Minard*[19] (Pet. 19, Br. 29) does not sustain this petition. That was a case of an unreasonable search and seizure in a state having no rule of evidence to implement the protection of the Fourteenth Amendment. Hence the validity of the search and seizure could not be made an issue in the state criminal proceeding or upon appeal therefrom, as held in *Wolf v. Colorado*.[20] The *Stefanelli* case begins with, and takes its importance from, the basic assumption that the constitu-

[19] 184 F. 2d 575 (C.A. 3d 1950) cert. granted May 14, 1951, No. 2 October 1951 Term.

[20] 338 U.S. 25 (1949).

tional issue cannot be asserted in the state criminal proceeding.[21] No such case is presented here.[22]

Petitioners assert a conflict between the decision below and the third circuit in the rule as to equitable intervention in pending state criminal cases. Both circuits hold that, when there is an opportunity to test rights by defending in the pending criminal proceedings, that opportunity must be exhausted.[23] There is no conflict. Whether, in the

---

[21] The petition in the *Stefanelli* case (No. 2, p. 9) quoted from the *Wolf* case to show that this Court recognized the basic constitutional right and left open the question of remedy, holding only that the rule of evidence followed by the State was one which it was competent for it to adopt.

[22] Of course the territorial proceedings are governed by the same constitutional provisions that govern in a federal court. *Territory v. Yoshimura,* 35 Haw. 324, 330; *Duncan v. Kahanamoku,* 327 U.S. 304 (1946); *Territory v. Kataoka,* 28 Haw. 173, 176. The procedure for attacking a criminal statute is not in question. See *Territory v. Kaholokula,* 37 Haw. 625. The procedure for attacking a grand jury is by challenge to the grand jury, or by motion to quash the indictment or plea in abatement. See the argument on the grand jury, p. 19, infra.

[23] In the *Stefanelli* case the third circuit said:

"Every question here raised by the appellants can be asserted by them in the New Jersey State Courts and the way to the Supreme Court of the United States lies open. Federal courts should not enjoin criminal proceedings in state courts save in exceptional cases to prevent irreparable injury which is clear and imminent. Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324."

Stefanelli v. Minard, supra, 184 F. 2d 575, 576 (C.A. 3d 1950).

The ninth circuit cases say:

"The constitutional question said to be for determination by the Federal court is one which the state court is competent to deal with in the criminal action pending before it. Its decision of the Federal question is subject to ultimate review in the Supreme Court of the United States. An adequate legal remedy is thus available. Fenner v. Boykin, supra (271 U.S. 240). There is plainly no warrant for equitable interference with the proceedings in the state tribunal, • • •"

Babcock v. Noh, 99 F. 2d 738, 740 (C.A. 9th 1938.)

"• • • in the four pending actions, the plaintiffs have at hand full opportunity to test their rights by defending in those proceedings. As this court said in Alesna v. Rice, 172 F. 2d 176, 177, 'Had the prosecution of the information proceeded, the jury might have ac-

light of *Wolf v. Colorado, Stefanelli* was a case for application of this rule is immaterial here.

In asserting a conflict with the third circuit petitioners cite *Cooper v. Hutchinson*[24] (Pet. 19, Br. 25, 27-28) as well as the later *Stefanelli* case. They note (Br. 28) that in the *Cooper* case the court only required the exhaustion of an interlocutory appeal to the state supreme court, whereas here some of the petitioners had taken an interlocutory appeal to the territorial supreme court which had upheld the constitutionality of the unlawful assembly and riot act.[25] The *Cooper* case was argued May 24, 1950 and decided July 21, 1950. Only a short time before, on April 3, 1950, this Court had decided *Darr v. Burford.*[26] *Darr* was not cited in the *Cooper* case, and there is nothing to show that the third circuit knew of it or considered it until the habeas corpus case of *United States v. Warden,* decided January 26, 1951, in which the third circuit said: "We entertain no doubt since Darr v. Burford, 339 U.S. 200, 70 S.Ct. 587, comparing Wade v. Mayo, 334 U.S. 672, 68 S.Ct. 1270, 92 L.Ed. 1647, with Ex parte Hawk, 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572, that in order to exhaust state remedies application for certiorari must be made to the Supreme Court."[27] *Stefanelli* shows that since *Darr* the third circuit, in equity cases as well, requires the ex-

---

quitted the defendants, appellants, and the constitutional and other questions avoided. In any event, the appellants had a speedy and sufficient remedy at law by appeal to the Hawaiian Supreme Court, where the appellants' arguments of the two contentions may have prevailed. Losing, there is the appeal here. In both appellate courts the practice gives primacy of consideration to criminal appeals.' (R. 2021-2022.)

"• • • the processes of the criminal law should be permitted to reach an orderly conclusion in the criminal courts where they belong." (R. 2022)

[24] 184 F. 2d 119 (C.A. 3d 1950).

[25] *Territory v. Kaholokula,* 37 Haw. 625 (1947).

[26] 339 U.S. 200.

[27] 187 F. 2d 615, 618.

haustion of remedies all the way to this Court.[28]

Although *Cooper* mentioned that section 2283 of Title 28 would not curb the court's power,[29] this presents no conflict because the court below did not reach that question as it specifically said (R. 2024). In an attempt to meet this absence of conflict petitioners argue (Br. 27-28) that section 2283 should have been reached by the court below, but this is on the completely erroneous assumption that there are no judicial rules limiting the enjoining of criminal proceedings, that only the statute stays the hand of the chancellor.

The sixth circuit decision in *McShane v. Moldovan*,[30] on which petitioners also rely (Pet. 19-20, Br. 31), is a damage suit in which no interruption of a state criminal proceeding was involved.

C. The court below properly applied the decisions of this Court.

The petition asserts conflict of the decision below with *Hague v. C.I.O.*,[31] *Douglas v. Jeannette*,[32] *American Federation of Labor v. Watson*,[33] *Screws v. United States*,[34] and *United States v. Classic*[35] (Pet. 16, 19),

Petitioners seek to uphold the portion of the trial court's opinion in which it relied on *Douglas v. Jeannette* for an "exceptional circumstance." The argument is based on the words "No person is immune from prosecution in good faith for his alleged criminal acts" appearing in the *Jeannette* case. (Br. 30, 33.) But there the quoted sentence is immediately followed by the explanation: "Its imminence, even though alleged to be in violation of constitutional guar-

---

[28] Note 23, supra.
[29] 184 F. 2d at p. 124.
[30] Miscited as 179 F. 2d 425 (Pet. 19-20). Apparently 172 F. 2d 1016 is intended.
[31] 307 U.S. 496 (1939).
[32] 319 U.S. 157 (1943).
[33] 327 U.S. 582 (1946).
[34] 325 U.S. 91 (1945).
[35] 313 U.S. 299 (1941).

anties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction."[36] As the Court of Appeals noted (R. 2016) the phrase "prosecution in good faith" was used in the *Jeannette* case in contradistinction to situations such as in *Hague v. C.I.O.*, cited and distinguished in the *Jeannette* case,[37] where the plaintiffs could not hold peaceful meetings because of a deliberate policy of breaking up such meetings and deporting those arrested, so that such interference could not be met by defending in criminal proceedings, which were a sham. This Court never has held that a defendant having full opportunity to test the criminal statute in a pending criminal proceeding could move into a federal equity court for his attack on the criminal statute by also attacking the prosecutor's motives.[38] The *Hague* and *Jeannette* cases involved no such situation.[39]

---

[36] 319 U.S. at p. 163.

[37] 319 U.S. at p. 164.

[38] The court below (R. 2015, note 7) noted three cases in which the defendant attacked the good faith of the prosecutor but was not allowed to move into the federal court. These were cited for comparison, being removal and habeas corpus cases, i.e. *Kentucky v. Powers*, 201 U.S. 1; *Mooney v. Holohan*, 294 U.S. 103; and *Ex parte Hawk*, 321 U.S. 114, 116.

[39] Both cases involved injunctions sought to protect the continuance of the exercise of lawful rights against threatened future interference therewith. Neither involved the seeking of an injunction against pending criminal proceedings. The terms of the decree in the *Hague* case speak for themselves; the decree prohibited interference with the holding of public meetings and distribution of literature and, second, required prompt production before a judicial officer of any persons arrested. In the *Jeannette* case the right to distribute religious literature was involved but the injunction was denied because not necessary for the protection of petitioners' rights. Petitioners were not the individuals already arrested and prosecuted in the state courts. Although appeals from such state prosecutions were pending (130 F. 2d 652, 655), no injunctive relief against the pending state proceedings was sought, as appears from the companion case of *Reid v. Brookville*, 39 F. Supp. 30, 32, cited as parallel on the facts in the trial court's decision in the *Jeannette* case, 39 F. Supp. 32, 33.

Screws v. United States[40] (Br. 30, 32) was a prosecution of officers who beat a prisoner to death, in which this Court distinguished "procedure which wrests from state courts the power to try offenses against their own laws."[41] *United States v. Classic*[42] (Br. 31), a criminal prosecution for violation by state officers of the rights of electors, has no bearing.

Petitioners further seek to uphold the portion of the trial court's opinion in which it relied on *A.F.L. v. Watson*[43] for an "exceptional circumstance." Petitioners are faced with the necessity of meeting the holding of the Court of Appeals that:

> "We are unable to perceive any resemblance between the facts here and those in A.F.L. v. Watson, supra. There it appeared that the plaintiff labor unions were engaged in negotiating closed shop agreements, as they asserted they had the right to do by virtue of the National Labor Relations Act,* * * *
>
> "Here there is no showing of any attempted collective bargaining, or other legitimate union activity with which any act here charged to the defendants could possibly interfere. The evidence shows, on the contrary, that the activities in which the plaintiffs were engaged at the time of the occurrence out of which the criminal prosecutions arose had nothing to do with any right granted by the Labor Management Relations Act, 1947, the Civil Rights Act [citing sections] or Amendments I, V, VI, XIV and XIX to the Constitution, upon which plaintiffs' rights are alleged to be founded. The activities and conduct of the plaintiffs here (characterized by the trial court as the 'illegal conduct of the strikers') involved the sort of conduct 'policing of [which] is left wholly to the States. . . . No one questions the State's power to police coercion by those methods.' *International Union, U.A.W. v. Wisconsin Board,* 336 U.S. 245, 253." (R. 2012-2013.)

[40] 325 U.S. 91.
[41] 325 U.S. at pp. 111-112.
[42] 313 U.S. 299.
[43] 327 U.S. 582.

Petitioners do not meet this holding. Instead, under the heading "Deprivation of Constitutional Rights," they deprecate the seriousness of the incidents involved (Br. 45).

The court below made the correct application of the rule, repeatedly laid down by this Court,[44] that mere allegations of unconstitutionality of a statute are not enough; the applicant for injunction must show threats of interference and such threatened interference must infringe upon the enjoyment of some property right or personal right. The court below reviewed the record (R. 2019-2020), noted that the injunctions issued by the trial court related solely to the prosecutions then pending (R. 2019 at note 9), that there were no allegations to support an injunction against future proceedings (R. 2019-2020), and that there was no finding that future prosecutions were threatened (R. 2020), and then summed up:

> "There is no proof or finding that for exercising lawful rights plaintiffs are threatened with future prosecutions under the statutes they assail." (R. 2021.)

Since only the four pending territorial criminal proceedings are involved in these suits, and by defense therein and on appeal therefrom the statutes and grand jury composition can be tested, the Court of Appeals manifestly was correct in ordering the dismissal of the suits on the authority of its own earlier decisions[45] and the decisions of this

---

[44] In addition to the *Hague, Jeannette,* and *A.F.L.* cases, see *Watson v. Buck,* 313 U.S. 387, 400 (1941), injunction proceedings; *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 99 (1949), injunction proceedings; *National Maritime Union v. Herzog,* 78 F. Supp. 146, 154, aff'd 334 U.S. 854 (1948), injunction proceedings; *United Public Workers v. Mitchell,* 330 U.S. 75, 89-91 (1947), declaratory judgment and injunction proceedings; *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 324 (1936), declaratory judgment and injunction proceedings.

[45] *Babcock v. Noh,* 99 F. 2d 738, 739 (C.A. 9th 1938), cited and explained at R. 2018-2019, 2021, 2025; *Alesna v. Rice,* 172 F. 2d 176, 177 (1949), cert. denied 338 U.S. 814, cited and explained at R. 2021, 2023, 2025.

Court.[46] While the decisions of this Court relate to state criminal proceedings it is now well settled, as the court below held and the petition does not deny, that "the Organic Act places the courts of the Territory of Hawaii in a relatively similar position to the federal judicial system as are the state courts." (R. 2024.)[47]

2. THE REVERSAL BY THE COURT BELOW OF THE DISTRICT COURT'S FINDING OF LACK OF GOOD FAITH WAS CORRECT.

If, by attacking the good faith of the prosecution, petitioners could move from the criminal court into the equity court for their attack on the criminal statutes and grand jury, they next would have to restore the finding of lack of good faith.

The Court of Appeals was specific in its reasons for reversing the finding. The court said:

> "The principal ground of bad faith is said to be that 'no one has been prosecuted under the unlawful assembly and riot act except in connection with labor disputes.' But unless riots did occur at places and under circumstances not involving labor disputes which called for complaints which the prosecutor refused or neglected to file, the quoted statement has no significance. It is not claimed, and there was no allegation or proof that there were any such unprosecuted violations. The remainder of the circumstances listed by the court's opinion as evidence of bad faith, it seems to us, are no

[46] *Ex parte Young*, 209 U.S. 123, 162 (1908) cited at R. 2020; *Cline v. Frink Dairy Co.*, 274 U.S. 445, 452-453 (1927) cited at R. 2021; *Fenner v. Boykin*, 271 U.S. 240, 243 (1926) cited at R. 2023. See also *Broad-Grace Arcade Corp. v. Bright*, 284 U.S. 588, aff'g 48 F. 2d 348.

[47] The Court of Appeals found this principle established by its earlier decisions in *Alesna v. Rice, supra*, 172 F. 2d at p. 179; *Wilder's S.S. Co. v. Hind*, 108 Fed. 113, 115, 116, aff'd 183 U.S. 545; and *Yeung v. Territory of Hawaii*, 132 F. 2d 374, 378; and by this Court's holding, in *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383 (1949) that in respect of the propriety of federal injunctive interference territorial courts resemble state courts.

> more than expression of the trial court's opinion that the prosecution was too vigorous, or that the police officers rather than the prosecuting attorney, should have selected the statute under which complaint would be filed, or that the methods used in securing evidence were poor."
>
> (R. 2017, and note 8, R. 2017-2018.)

Petitioners do not meet this by their undocumented statement that the finding was "on the basis of the whole record" (Br. 48). Even as to the principal ground of the finding, they make no attempt to show by the record that they did prove the fact missing from the finding and which the court below said was not proven i.e. like offenses of other persons.[48]

3. THE DISTRICT COURT ERRED IN INVALIDATING THE CRIMINAL STATUTES AND THE GRAND JURY.

The District Court not only erred in reaching the constitutional issues but also erred in its treatment of those issues.

A. The District Court erred in invalidating the unlawful assembly and riot act.

The Unlawful Assembly and Riot Act[49] was construed by the Supreme Court of Hawaii in the Kaholokula case.[50] The Supreme Court held that the statute was derived from the common law, that the phrase "striking terror or tending to strike terror," used throughout the statute, took its meaning from the common law, and that "acts which strike or tend to strike terror into others are essential ingredients

---

[48] See p. 3, note 5, where respondents have called attention to the inclusion in petitioners' statement of facts not found by either court and not supported by record citations.

[49] Chapter 277, Revised Laws of Hawaii 1945, printed in the appendix of the petition (pp. 53-57).

[50] 37 Haw. 625 (1947).

of the offense." This construction was authoritative,[51] and the Hawaii court was correct in its holding that a statute may take its meaning from the common law.[52] Nevertheless the trial court construed the statute for itself and struck it down on the basis of its own construction (R. 444-460). Disregarding the meaning given by the common law to the phrase "in terrorem populi" employed throughout the statute and there expressed in the words "striking terror, or tending to strike terror into others," the trial court held that these words did not contemplate the reasonable man test and were "purely subjective" (R. 453). The court thus excised the words that confined the statute to a clear and present danger of breach of the peace and assured its constitutionality.[53] None of the cases in point is cited by petitioners (Br. 35-39).

B. The District Court erred in invalidating the conspiracy statute.

For present purposes it is sufficient to point out that this case involves more than one portion of the conspiracy statute.[54] Among the provisions involved is one defining a conspiracy as a "mutual undertaking * * * to commit any offense."[55] No reason was assigned for invalidating this por-

---

[51] *A.F.L. v. Watson*, 327 U.S. 582, 598 (1946); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383 (1949); *Shipman v. DuPre*, 339 U.S. 321 (1950); *Winters v. New York*, 333 U.S. 507, 514 (1948); *Musser v. Utah*, 333 U.S. 95, 98 (1948).

[52] *Nash v. United States*, 229 U.S. 373, 376, as construed in *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

[53] *Cole v. Arkansas*, 338 U.S. 345; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573; *Cantwell v. Connecticut*, 310 U.S. 296, 308; *Feiner v. New York*, 340 U.S. 315, 319.

[54] Chapter 243 of the Revised Laws of Hawaii 1945, printed in the appendix of the petition (pp. 53-57).

[55] That this was involved appears at R. 401 where the trial court describes the second count of the indictment in Criminal No. 2365, Cause No. 12,301, R. 32-34, as "conspiracy to commit a felony, third degree." Correctly, conspiracy to commit a misdemeanor, i.e. assault and battery, was involved.

tion of the statute (R. 461-467). Its severability was not considered by the trial court; it clearly was severable.[56]

C. The District Court erred in invalidating the 1947 grand jury.

Petitioners state with respect to their attack on the composition of the grand jury[57] that "Petitioners have done all they can to get relief under territorial law. . . ." (Br. 28.) This is not correct. The parties in No. 12,300 challenged the grand jury in the territorial circuit court; after an extensive hearing the court denied the challenges (see R. 59-87, 567-1082). Instead of appealing, these persons went into federal court and secured a temporary restraining order which prevented the grand jury from acting before it went out of office, thus deliberately mooting the grand jury issue as to them (R. 1085-1096). The mootness was recognized by the District Court, as its decree in No. 12,300 is silent with respect to the composition of the grand jury (R. 543). The parties in No. 12,301, who were indicted in Criminal No. 2365 on December 2, 1947, have not attacked the grand jury in the territorial court although they could do so by plea in abatement or by motion to quash the indictment.[58] Hence, the grand jury issue again boils down to an attempt by the defendants under indictment in Criminal No. 2365 to proceed in a federal equity court in lieu of proceeding in the territorial court where this constitutional issue could be presented.

---

[56] *Territory v. Tam,* 36 Haw. 32, 51; *Stromberg v. California,* 283 U.S. 359, 367-368.

[57] Petitioners did not attack the validity of the grand jury statutes, but only their administration.

[58] *Territory v. Braly,* 29 Haw. 7. That this practice is of long standing in the Territory of Hawaii appears from *Kaizo v. Henry,* 211 U.S. 146 (1908), where a plea in abatement was used. Hawaii being a territory, this Court's holding as to remedies in *Carter v. Texas,* 177 U.S. 442, necessarily applies.

Moreover, petitioners try to make a negro-exclusion-type case out of the absence of Filipinos from the grand jury list of 50 (there were no Koreans, full-blooded Hawaiians, or Puerto Ricans either), although the Territory is a racial melting pot, and petitioners concede there were 7 Japanese, 4 Chinese and 12 part-Hawaiians or 23 non-Caucasians, on the list (R. 1942-1943). In addition, the eligible Filipino group in Maui County is both recent and minute.[59]

Petitioners also claim they "showed exclusion of wage earners under the test laid down in *Thiel v. Southern Pacific Co.*, 328 U.S. 217" (Br. 42). However, the District Court found there were 6 laboring men named on the grand jury list (R. 501). Thus, petitioners are really trying to establish a new rule of proportionate representation according to occupation. Moreover, the District Court's treatment is so artificial that the court classified in its employer-entrepreneur group (R. 500) three out of six ILWU men on the list.[60]

---

[59] Cf *Moore v. New York*, 333 U.S. 565, 568 (1948).

[60] Union men Ito (R. 729), Saka (R. 731) and Muroki (R. 1037) must have been placed in the District Court's employer-enterpreneur group, inasmuch as they are not among the 6 persons listed by petitioners as daily wage earners (R. 1439), which list tallies with the court's findings of 6 laborers (R. 501).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. GARNER ANTHONY,
Special Deputy Attorney General,

RHODA V. LEWIS,
Deputy Attorney General,

RICHARD K. SHARPLESS,
Deputy Attorney General,

Counsel for respondents Walter D. Ackerman, Jr., individually and as Attorney General of the Territory of Hawaii and Jean Lane, individually and as Chief of Police of the County of Maui.

October 5, 1951